Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP ANDRE RENNERT,
MICHAEL LEWIS MILLER,
and GEORGE RAYMOND JENSEN,

Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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April 2000

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QUESTIONS PRESENTED

1. Does section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), as criminalized by § 24 of the Act, 15 U.S.C. § 77x, describe a single offense that may be committed by any of three means, or must the jury, in order to convict, unanimously find that a defendant committed an unlawful act described in a particular one of the provision's three separately-numbered subsections?

2. In a federal securities fraud prosecution, are the defendants deprived of a fair trial by a jury instruction, summarizing the government's theory of the case, which entirely omits the critical requirement of knowledge of the key fact -- here, the defendants' alleged "holding" of "restricted stock" as defined by 17 C.F.R. § 230.144 (SEC Rule 144)?

3. In reversing the district court's considered determinations that the petitioners' conduct did not cause financial loss and did not jeopardize the safety and soundness of a financial institution, did the court of appeals violate 18 U.S.C. § 3742(e) by failing to give "due deference to the district court's application of the guidelines to the facts"?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Philip Andre Rennert, Michael Lewis Miller, and George Raymond Jensen and the United States). Other co-defendants named in the indictment, some of whom were co-appellants below, are not parties to this petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES v
PETITION
OPINIONS BELOW 1
JURISDICTION 2
FEDERAL STATUTES AND RULE INVOLVED ... 2
STATEMENT OF THE CASE
a. Procedural History 5
b. Statement of Facts 6
c. Statement of Lower Court Jurisdiction 10
REASONS FOR GRANTING THE WRIT
1. The decisions of the court below in these cases conflict with this Court's reading of the same statute in the 1979 Naftalin decision on the question whether the three subsections of § 17(a) of the Securities Act of 1933 describe three separate offenses or simply three alternate means of committing a single offense of securities fraud 10
2. The decision of the court below allowed the jury to find securities fraud based on a violation of the SEC's "restricted stock" regulation, without requiring proof beyond a reasonable doubt that the defendant-petitioners knew of the restricted character of the stock 17

3. In reversing the district court's considered determinations that the petitioners' conduct did not cause financial loss and did not jeopardize the safety and soundness of a financial institution, the court of appeals violated 18 U.S.C. § 3742(e) by failing to give "due deference to the district court's application of the guidelines to the facts" 20

CONCLUSION 23

INDEX TO APPENDIX

A. Published Opinion of the Court of Appeals (Oct. 15, 1999) ..... Appx. A1

B. Unpublished Memorandum Opinions of the Court of Appeals on three individual cases (Oct. 15, 1999) ..... Appx. B1

C. Memorandum of the District Court denying post-trial motions (Nov. 17, 1997) ..... Appx. C1

D. Orders of the Court of Appeals denying rehearing (Nov. 17, 1999) ..... Appx. D1

TABLE OF AUTHORITIES

CASES

Aaron v. SEC, 446 U.S. 680 (1980) 13
Bryan v. United States, 524 U.S. 184 (1998) 18
Crain v. United States, 162 U.S. 625 (1896) 14
Dorszynski v. United States, 418 U.S. 424 (1974) 20
Johnson v. United States, 520 U.S. 461 (1997) 19, 20
Jones v. United States, 526 U.S. 227 (1999) 15
Koon v. United States, 518 U.S. 81 (1996) 21
Mistretta v. United States, 488 U.S. 361 (1989) 20
Morissette v. United States, 342 U.S. 246 (1952) 18
Neder v. United States, 527 U.S. 1 (1999) 19, 20
Ratzlaf v. United States, 510 U.S. 135 (1994) 18
Richardson v. United States, 526 U.S. 813 (1999) 16
Roberts v. United States, 445 U.S. 552 (1980) 20
Rogers v. United States, 522 U.S. 252 (1998) 18
Schad v. Arizona, 501 U.S. 624 (1991) 12, 16
Staples v. United States, 511 U.S. 600 (1994) 18
United States v. Birrell, 266 F.Supp. 539 (S.D.N.Y. 1967) 14, 15
United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) 16
United States v. Naftalin, 441 U.S. 768 (1979) ... 6, 12, 13
United States v. Rennert, 1997 WL 597854 (E.D.Pa.) .. 1
United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976) 16
United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) 14
United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 17
United States v. Yeaman, 987 F.Supp. 373 (E.D.Pa. 1997) 1
Williams v. United States, 503 U.S. 193 (1992) 21

STATUTES AND RULES:

U.S. Const., amend. VI (jury cl.) 12
15 U.S.C. §§ 77q 5, 10, 11, 13, 15-17, 20
15 U.S.C. § 77x 3, 5, 10, 11, 13, 15, 17
18 U.S.C. § 371 5
18 U.S.C. § 1341 15
18 U.S.C. § 1343 5
18 U.S.C. § 3231 10
18 U.S.C. § 3553(b) 22
18 U.S.C. § 3742 ..... 5, 10, 20-22
28 U.S.C. § 1291 10
28 U.S.C. § 2101(c) 2
17 C.F.R. § 230.144 ..... 4, 17
S.Ct. Rules 13.1, 13.3, 30.1 2
S.Ct. Rule 14.1(g)(ii) 10
USSG § 2F1.1(b) 22

MISCELLANEOUS:

William B. Herlands, *Criminal Law Aspects of the Securities Act of 1933*, 67 United States L.Rev. 562 (1933) 14
Louis Loss, *Fundamentals of Securities Regulation* (2d ed. 1989) 15
Louis Loss, *Securities Regulation* (1951) 15
VII Louis Loss & Joel Seligman, *Securities Regulation* (3d ed. 1989-1995) 15
1 Charles A. Wright, *Federal Practice and Procedure: Criminal* (3d ed. 1999) 16
1A Charles A. Wright, *Federal Practice and Procedure: Criminal* (3d ed. 1999) 16

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PHILIP ANDRE RENNERT, MICHAEL LEWIS MILLER, and GEORGE RAYMOND JENSEN respectfully petition this Court for a writ of certiorari to review the judgments, opinion and memoranda of the United States Court of Appeals for the Third Circuit filed and entered on October 15, 1999.

OPINIONS BELOW

The Opinion of the Court of Appeals (per Stapleton, J., with Sloviter & Nygaard, JJ.) on a co-appellant's case, adopted with respect to the issues covered there in each of the separate memorandum opinions in petitioners' cases (see Appx. B6 n.2, B13 n.2, B19 n.2), is published sub nom. United States v. Yeaman, 194 F.3d 442 (3d Cir. 1999). Appendix A. The Memorandum Opinions in the petitioners' separate cases, filed the same day, are not published. Copies are attached as Appendix B; the judgments are noted at 202 F.3d 255 (table). The district court's opinion denying post-trial motions is not published but is available as United States v. Rennert, 1997 WL 597854 (E.D.Pa.); a copy is Appendix C.[1]

[1] An immaterial district court opinion denying a pretrial motion by a co-defendant to strike certain language from a count of the indictment not at issue in this petition is published as United States v. Yeaman, 987 F.Supp. 373 (E.D.Pa. 1997).

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit affirming the petitioners' convictions and remanding for resentencing were filed and entered on October 15, 1999. Appendix A. Timely petitions for rehearing were denied by Orders dated November 17, 1999. Appendix D. On February 7, 2000, under No. 99A627, Justice Souter extended the time for filing this petition to and including April 14, 2000. This petition is timely filed on or before that date. Rules 13.1, 13.3, 30.1; 28 U.S.C. § 2101(c). Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND RULE INVOLVED

Section 17(a) of the Securities Act of 1933, provides:

> (a) **Use of interstate commerce for purpose of fraud or deceit.** It shall be unlawful for any person in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). Willful violations of § 17(a) are criminalized by § 24 of the Act, which provides:

> Any person who wilfully [sic] violates any of the provisions of this title [i.e., title I of the '33 Act; 15 U.S.C. §§ 77a-77aa], or the rules and regulations promulgated by the Commission under authority thereof, or any person who wilfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statement therein not misleading, shall upon conviction be fined ... or imprisoned not more than five years, or both.

15 U.S.C. § 77x.

Part 230 ("General Rules and Regulations, Securities Act of 1933") of the Rules of the Securities and Exchange Commission include SEC Rule 144, which provides, in pertinent part:

> (a) Definitions. The following definitions shall apply for the purposes of this section.
>
> * * *
>
> (3) The term restricted securities means:
>
> (i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or

chain of transactions not involving any public offering;

* * *

(b) Conditions to be met. Any affiliate or other person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to be engaged in a distribution of such securities and thereof not to be an underwriter thereof within the meaning of section 2(11) of the Act if all of the conditions of this section are met.

* * *

(d) Holding period for restricted securities. If the securities sold are restricted securities, the following provisions apply:

(1) General rule. A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities. * * *

17 C.F.R. § 230.144.

The Sentencing Reform Act provides, in pertinent part:

§ 3742. Review of a sentence

* * * *

(e) Consideration.-- Upon review of the record, * * * *

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e).

STATEMENT OF THE CASE

This petition presents important questions concerning the scope of the federal securities fraud statute, and the manner of its criminal enforcement at trial and the standard of appellate review for guideline sentencing determinations. The Third Circuit's opinions uphold the petitioners' convictions, after a joint jury trial, for securities fraud. The defendant-petitioners' sentencing appeals were also rejected, but on the government's cross-appeal the judgments of sentence were vacated and remanded for resentencing.

a. Procedural History

A federal grand jury in the Eastern District of Pennsylvania charged petitioners Rennert, Miller and Jensen, plus two other defendants, in February 1996 with conspiracy, wire fraud, and securities fraud. 18 U.S.C. §§ 371, 1343; 15 U.S.C. §§ 77q, 77x. The indictment alleged that the conspiracy existed from about May of 1990 to June of 1992. Petitioners stood trial before

Judge Clarence C. Newcomer a jury in March and April 1997. Petitioners were acquitted on several charges and convicted on others; the jury hung on yet other counts.

Judge Newcomer denied post-trial motions by opinion dated September 17, 1997. The memorandum and order are Appx. C to this Petition.

In January 1998, the district court sentenced the petitioners to terms of imprisonment and to pay fines. Notices of appeal were timely filed, and the district court allowed bail pending appeal. On appeal, the Third Circuit affirmed the convictions in a lead, published opinion, Appx. A, and supplemental separate unpublished memoranda. Appx. B. On the government's cross-appeal, the sentences were vacated and remanded for reconsideration. Appx. B6-B7, B13-B14, B20; United States v. Yeaman, 194 F.3d 442, 456-65 (3d Cir. 1999). Appx. A24-A45. Rehearing was denied, over the recorded dissent of Chief Judge Becker, who expressed the view that the panel decisions were inconsistent with the opinion of this Court in United States v. Naftalin, 441 U.S. 768 (1979). See Point 1 infra.[2]

b. Statement of Facts

The facts as related at trial are set forth in detail in the court of appeals' opinions. App. B. As recited in the Rennert opinion, each defendant's conviction "resulted from his involvement in a complex scheme involving the leasing of worthless stocks of multiple public companies to the Teale Network ("Teale"), a fraudulent network of offshore and domestic companies." App. B2. (The Teale

[2] By orders dated December 8, 1999, the court of appeals (Sloviter, J.) granted stays of mandate pending the timely filing of this petition.

Network was organized and controlled by Alan Teale, named as unindicted do-conspirators. The court below referred to them collectively as "Teale.") "Teale represented these leased stocks as assets available to pay claims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Co. ("World Life"). When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless."

"World Life became insolvent at some point in or before 1988. It hid its insolvency from regulators and its insureds, however, by placing a piece of land valued at $60,000 on its books as worth several million dollars. World Life issued the four group medical policies involved in this case in late 1989, in the spring of 1990, in the summer of 1990, and on December 1, 1990. Teale's contracts reinsuring these policies were entered on November 16, 1989, May 30, 1990, June 28, 1990, November 10, 1990, and November 11, 1990. Pursuant to these agreements, Teale assumed 100% of the liability under the four group medical insurance policies issued by World Life in exchange for 92% of the premiums paid by World Life's insureds on those policies. These reinsurance transactions allowed World Life to reflect a reserve credit of approximately $6 million. Teale received total premiums from World Life of approximately $7 million under its reinsurance contracts." App. B2-B3.

"In 1990, Philip Rennert created Forum Rothmore, which acted as an intermediary between Teale and publicly traded corporations that desired to lease their stock. Forum Rothmore entered into "surplus contribution agreements," known as RENN contracts, with Teale. The first RENN contract involving one of the defendants was executed on September 1, 1990.

"Under the terms of these contracts, corporations leased their stock to Teale and authorized the sale of the stock if necessary to pay claims under insurance policies Teale had reinsured. The value of the stock leased was calculated by multiplying the number of shares by the market price. Teale then listed these shares at the same value on financial statements presented to World Life. In exchange, Teale paid a percentage of monthly leasing fees it received from World Life to Forum Rothmore, which in turn split the fees with the stock providers. Of the approximately $7 million Teale received, about $3.3 million was distributed to the defendants as rental fees for the leased securities.

"The corporations that leased their stock through Forum Rothmore to Teale had few significant assets and little profit making activity." App. B2-B3. "In addition to providing legal service to Forum Rothmore, Miller was a shareholder of Ecotech Corporation (Ecotech), one of the publicly-traded corporations whose stock was leased to Teale." App. B11. "Miller owned a substantial portion of Ecotech stock and thus was to, and did receive, a portion of the insurance premiums paid out under the terms of the reinsurance contracts. Miller was also involved in attempts to have the restrictive legends of various stocks removed and to maintain the inflated values of the worthless stocks." App. B12-B13.

"Jensen was at various times the control person and president of Ecotech. Ecotech had few significant assets and little profit making activity. In spite of the corporations minimal value, Jensen purported to lease $32 million of Ecotech stock. In order to be able to attribute such high values to these stocks, Jensen manipulated the quotes and inflated the financial statements of these

corporations. Moreover, while certain of these stocks were restricted, they were represented to be marketable and were transferred without any indication of their restricted status. Forum Rothmore assisted Jensen in leasing these falsely-valued and restricted stocks." App. B17-B18.

"In spite of the corporations' minimal value, over $50 million of stock was leased to Teale. In order to be able to attribute such high values to these stocks, the defendants manipulated the market quotes and inflated the financial statements of these corporations. Moreover, while certain of the stocks were restricted, they were represented to be marketable and were transferred without any indication of their restricted status. In short, the defendants and Teale falsely held out securities as marketable and valuable, when, in fact, they were unmarketable and virtually without value.

"In January 1991, the Pennsylvania Insurance Department began to investigate World Life's financial condition. On July 28, 1991, the Pennsylvania Insurance Commissioner declared World Life insolvent and ordered its liquidation. Since Teale had been paying insurance claims with recently received premiums and had no other significant assets to draw upon, this liquidation deprived Teale of the ability to pay further claims.

"The Pennsylvania Life and Health Insurance Guarantee Fund is a state fund authorized by statute to pay outstanding liabilities of licensed Pennsylvania companies that become insolvent. The Guarantee Fund is financed by Pennsylvania insurance companies. When World Life was liquidated, the Guarantee Fund paid the outstanding group medical reinsurance claims left unpaid as a result of the fraud. The unpaid claims totaled over $6 million." Appx. B3-B4.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. §§ 3742(a),(b).

REASONS FOR GRANTING THE WRIT

1. The decisions of the court below in these cases conflict with this Court's reading of the same statute in the 1979 Naftalin decision on the question whether the three subsections of § 17(a) of the Securities Act of 1933 describe three separate offenses or simply three alternate means of committing a single offense of securities fraud.

Ascertaining whether Congress intended a given statute to describe one offense, which may be committed in any of several ways -- on which the jury then need not be unanimous --, or intended on the other hand to describe several different offenses -- on one or more of which the jury would then have to agree unanimously as to each defendant --, can be one of the most difficult issues in federal criminal statutory construction. In this case, the Third Circuit construed § 17(a) of the 1933 Securities Act, as criminalized through § 24 of that Act, to establish but a single offense, contrary to every indication in the statutory language and in this Court's precedent. In so doing, the court below upheld an instruction advising that the jury need not reach a unanimous verdict

as to which of the statute's three forms of prohibited conduct any defendant had committed. The Court should grant certiorari to clarify this important and elusive issue, and to uphold the integrity of its precedent interpreting § 17(a).

Section 17(a), codified at 15 U.S.C. § 77q(a), is entitled "Use of interstate commerce for purpose of fraud or deceit." The section makes it "unlawful" in commerce or by mail "for any person in the offer or sale of securities ... directly or indirectly" to commit any of three prohibited actions:

> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Willful violations of § 17(a), inter alia, are criminalized by § 24 of the Act, 15 U.S.C. § 77x. The indictment in this case alleged that petitioners' conduct violated all three subsections of § 17 of the '33 Act.

The trial court rejected a proposed jury instruction for the defense which would have told the jurors that to convict they had to be unanimous as to which one or more, if any, of the three subsections of the Act any defendant may have violated.[3] The court of appeals

[3] On post-trial motions, the district court ruled that petitioners

affirmed, ruling that the statute:

> requires that the defendants' conduct with respect to that offer or sale fall within one or more of three closely related categories -- a "device, scheme or artifice to defraud," an obtaining of money or property by material misrepresentation, or a transaction that operates as a fraud or deceit on a purchaser. While each category has its own parameters, *see United States v. Naftalin*, 441 U.S. 768, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979), they are largely overlapping categories and all fall within the traditional understanding of the concept of fraud. Most conduct that falls within one is likely to satisfy another as well.

A17-A18. This ruling misconstrued the statute, deviated unacceptably from this Court's precedent, and deprived the petitioners of their right to a unanimous jury verdict on each charged offense, as guaranteed by the Sixth Amendment. It demonstrates the need for this Court to revisit this area. See Schad v. Arizona, 501 U.S. 624 (1991) (addressing constitutional aspects; no majority view).

Chief Judge Edward R. Becker dissented from the Circuit's denial of rehearing in banc on the unanimity issue in each of these cases:

> believing that the panel's opinion is in conflict with the considered dicta in United States v. Naftalin, [441 U.S. 768, 774,] 99

_____(cont'd)

had waived this objection. App. C46. The court of appeals, however, found that they had not. App. A16 n.5.

> S.Ct. 2077 (1979), where the Court, referencing the statute in question[, unanimously] stated: [']Each succeeding prohibition is meant to cover additional kinds of illegalities -- not to narrow the reach of the prior sections.[']"

Appx. D1-D2, D3-D4, D5-D6. In Naftalin, this Court affirmed a criminal conviction under § 17(a) of the Act against the defense argument that only frauds "upon the purchaser" of securities were covered. The Court held unanimously that by the plain statutory language, only offenses under subsection (3) implicated such a requirement. In doing so, the Court noted that the statutory structure strongly supported the view that "each of the three subsections ... proscribes a distinct category of misconduct." Id. at 774. If so, then each subsection describes a different offense (when committed "wilfully," as stated in § 24).

This Court followed Naftalin a year later when it decided Aaron v. SEC, 446 U.S. 680, 695-700 (1980). In that case, a civil injunctive action, the Court held that subsection (a)(1), standing alone without reference to § 24, contained a mens rea element of intent to defraud, which subsections (a)(2) and (a)(3) did not. The Court chose again "to emphasize the distinctions among the three subparagraphs of § 17(a)." 446 U.S. at 697. The statute did not, according to the Court, simply describe three kinds of schemes to defraud, violative of a single standard. In Naftalin, the Court cited with approval a 1967 district court opinion by Judge Herlands, an early authority on the criminal securities law. See 441 U.S. at 774, citing United States v. Birrell, 266 F.Supp. 539

(S.D.N.Y. 1967).[4]

In Birrell, Judge Herlands observed that "the three subdivisions of § 77q(a) express the statutory purpose of making the acts specified in those subdivision separate and distinct ...." From this, the court reasoned, "there is strong logic to the view that each of the different acts defined in those subdivisions can serve as an 'allowable unit of prosecution.'" Id. at 543, quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952). "Each infinitive designates an unlawful act." 266 F.Supp. at 543. Compare Crain v. United States, 162 U.S. 625, 634-36 (1896) (False Claims Act, making it a crime knowingly to falsely make, alter, forge or counterfeit any writing to make claim with the intent to defraud the United States, describes a single offense).

The view of the court below is self-refuting. If it is so that the three subsections "are largely overlapping categories and all fall within the traditional understanding of the concept of fraud," App. A17, then some instances do not overlap. And it is hardly surprising if different offenses defined in a single statute have at least a common theme. Again, if "Most conduct that falls within one is likely to satisfy another as well," App. A18, then some conduct will certainly fall within one subsection and not at all within either of the others. "The distinction between the three subdivisions may seem esoteric because they entail hairline differences of proof. But Congress, who deliberately made the distinctions, evidently did not think them so. And experience with

[4] Judge Herlands also cited a 1933 law review article he had authored while serving as an Assistant U.S. Attorney, on *Criminal Law Aspects of the Securities Act of 1933*, 67 United States L.Rev. 562, 570-72 (1933).

criminal trials demonstrates that the unexpected frequently happens." 266 F.Supp. at 543.

The structure of the statute further supports the petitioners' reading. The description of each of the three separate illegal actions is prefaced by a separate subsection number, each is expressed with a definitive verb, and each (not simply the last) is followed by an "or." See Jones v. United States, 526 U.S. 227, 143 L.Ed.2d 311, 319-20 (1999) (making similar structural analysis of numbered subsections to determine their function in a statute). It is hard to imagine what Congress could have done, short of enacting three separate sections of the 1933 Securities Act, to make clear that these offenses stand independently of one another.[5]

The separateness of the three subdivisions of § 17(a), deemed unimportant by the court below, has always been evident to the most distinguished scholar of securities law, Professor Louis Loss. In the very first edition of his great treatise, Loss confidently wrote, "Section 17(a) creates three separate offenses ...." *Securities Regulation* 807 (1951); the third edition varies the text only immaterially, see VII Louis Loss & Joel Seligman, *Securities Regulation* 3407-08 & 3409 n.9 (3d ed. 1989-1995) ("Section 17(a), the 'grandfather' of all the SEC fraud provisions, creates three separate offenses ...."); see also Louis Loss, *Fundamentals of Securities Regulation* 700 (2d ed. 1989) (same).

Because § 17(a), in combination with § 24, creates three separate offenses, the petitioners were denied their

[5] In each of these aspects, the statute stands in marked contrast to the structure of the mail fraud statute, 18 U.S.C. § 1341, on which § 17(a) was in certain substantive respects modeled.

right to the verdict of a unanimous jury in this case. Richardson v. United States, 526 U.S. 813 (1999). The subdivisions of this Act do not describe "possible sets of underlying brute facts [which] make up a particular element," id.; this is not a mere difference of means, like the difference between a robbery by knife and a robbery at gunpoint. Various tests have been proposed in the lower courts for distinguishing alternate but separate offenses, on the one hand, from alternative means for the commission of a single offense, on the other. See, e.g., United States v. Gipson, 553 F.2d 453 (5th Cir. 1977); United States v. UCO Oil Co., 546 F.2d 833 (9th Cir. 1976); see generally 1A Charles A. Wright, *Federal Practice and Procedure: Criminal* § 142, at 9-14 (3d ed. 1999); cf. 1 id. § 125, at 566 (discussed as issue in pleading of indictments). This Court has recognized the difficulty and importance of the problem, but to date has refrained from tackling the issue head on. See Schad, 501 U.S. at 633-39 (plurality). This case presents a suitable opportunity to attempt that task.

In this case, the trial court's refusal of a specific unanimity instruction, Appx. C46, affirmed by the court below, Appx. A15-21 (194 F.3d at 452-55), contradicts this Court's precedent both as to the proper understanding of § 17(a), as Chief Judge Becker noted, and seemingly with respect to the right to a unanimous verdict in a criminal case. The lower courts need this Court's guidance on the latter, important issue. For this reason, the Court should grant this petition for a writ of certiorari.

2. The decision of the court below allowed the jury to find securities fraud based on a violation of the SEC's "restricted stock" regulation, without requiring proof beyond a reasonable doubt that the defendant-petitioners knew of the restricted character of the stock.

The Court should also grant certiorari to review the decision of the court below affirming a jury instruction that omitted the critical element of knowledge in this securities fraud case, in contradiction to all of this Court's cases on the requirement of mens rea.

The court below found nothing "legally inaccurate or improper," Appx. A22-A23 (194 F.3d at 456), in a convoluted and virtually unintelligible jury instruction (set forth, id. at 455 n.7) which summarized the government's theory of the case and purported to "provide examples of the way that the defendants may have violated Section 17(a)." Id. at 456. By entirely omitting any requirement that the jury find guilty knowledge of the central fact (that the stock was "restricted" within the meaning of the Rule, *see* Statutes Involved *ante*), however, the court rendered a decision fundamentally at odds with this Court's recent and venerable decisions alike.

It is perfectly evident that no one can "wilfully," 15 U.S.C. § 77x, violate an SEC regulation that governs dealings in "restricted stock," unless he or she knows that the stock in question is "restricted," within the meaning of the regulation, 17 C.F.R. § 230.144. Otherwise, one would not imagine it was a wrongful act to sell stock, nor to lease it. In United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the Court read a requirement that the government prove knowledge of the fact making the

conduct wrongful into a criminal statute, based on legal tradition and due process concerns, where it was not so clear that Congress intended that result.

Likewise, in Staples v. United States, 511 U.S. 600 (1994), the Court found a knowledge element applicable to the fact that made the conduct in question unlawful, where the defendant's conduct -- owning a firearm -- was not otherwise considered wrongful. See Bryan v. United States, 524 U.S. 184 (1998) (discussing knowledge element under firearms law and contrasting it with "willfulness"); cf. Rogers v. United States, 522 U.S. 252 (1998) (dismissing writ, but revealing divergent views on meaning of "knowledge" as used in gun possession laws). Finally, in the leading case of Morissette v. United States, 342 U.S. 246 (1952), the Court ruled that Congress did not intend to exclude mens rea in the case of theft of government property -- scrap metal picked up from the grounds of a military reservation. See also Ratzlaf v. United States, 510 U.S. 135 (1994) (structuring of transactions not inherently wrongful; if illegality itself is the only fact making conduct wrongful, then knowledge of the law may be a required element).

The instruction under challenge never mentioned the requirement that a defendant-petitioner, to be guilty of fraud on account of what he did with possession of restricted stock, must have known the stock was "restricted."[6] The instruction thus omitted a key,

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[6] The court charged:

> I have already defined for you what a restricted stock is and the requirements under the law if and when the restricted stock is going to be sold. If you find that the defendants held restricted stock, then you may find the defendants engaged in acts, practices

contested element of the offense -- indeed, for petitioner Miller, at the heart of his defense. This Court has never hesitated to recognize such an instruction as "error." Neder v. United States, 527 U.S. 1, 144 L.Ed.2d 35, 46 (1999); Johnson v. United States, 520 U.S. 461 (1997). Yet the court below found this instruction not to be "improper in any respect." App. A23.

_____(cont'd)

> and courses of business that operated as a fraud and deceit. And that they made material misrepresentations by manipulating the price of the stocks by contributing them to the off-shore reinsurers who placed them on their financial statements to give the appearance of highly valued assets, by participating in the misrepresentations made by their coconspirators who used those financial statements to misrepresent the financial well being of the off-shore reinsurers when contracting with a primary insurance company in Pennsylvania. And by misrepresenting that these stocks could be liquidated to meet claims when they could not.
>
> Now, the Government also contends that the defendants made use of certain restricted securities in furtherance of the fraudulent acts and practices by distributing and pledging these restricted stocks to the banks which held and maintained the escrow accounts. If you find that the defendants held restricted stock, then you may find that the defendants engaged in acts, practices and courses of business that operated as a fraud and deceit and made material misrepresentations in connection with the deposit of those stocks into the escrow accounts, if you find one or more of the following.

App. A22 n.7; 194 F.3d at 455-56 n.7.

In Johnson, the issue was whether the error was "plain"; in Neder, the Court analyzed whether the error could be, and then whether it was, harmless. Here, the issue was preserved, and could not have been harmless on Count 11, the § 17(a) count. To emphasize the requirement of guilty knowledge as an element of regulatory securities offenses, and to correct the deviation from this Court's precedent on jury instructions which omit element so the offense, this petition should be granted.

3. In reversing the district court's considered determinatio..s that the petitioners' conduct did not cause financial loss and did not jeopardize the safety and soundness of a financial institution, the court of appeals violated 18 U.S.C. § 3742(e) by failing to give "due deference to the district court's application of the guidelines to the facts."

Overturning a longstanding tradition of highly discretionary sentencing decisions, virtually insulated from appellate scrutiny, see Roberts v. United States, 445 U.S. 552, 559-61 (1980); Dorszynski v. United States, 418 U.S. 424, 431, 437, 440 (1974), the 1984 Sentencing Reform Act established a system of relatively determinate guidelines, coupled with a regime of limited review in the court of appeals, the parameters of which are defined by the terms of 18 U.S.C. § 3742. See Mistretta v. United States, 488 U.S. 361, 367-68 (1989) (identifying appellate review as one of five key alterations in "the old sentencing process" made by the SRA). Although the court below identified no legal error in the district court's application of the guidelines, it neverthe-

less reversed two key decisions made by Judge Newcomer at sentencing which had been favorable to the defendants. App. A25-A36. This case presents an excellent opportunity for the Court to clarify and define the line drawn by Congress between the district courts' continuing discretion and the courts of appeals' mandate to conduct a limited and deferential review.

In Koon v. United States, 518 U.S. 81, 96-98 (1996), this Court discussed the standard of appellate review as applied to a sentencing judge's departures from the guideline range. See also Williams v. United States, 503 U.S. 193 (1992) (analyzing § 3742 to find standard for harmless error in sentencing appeals). The Court has yet to analyze, however, the contours of that review as applied to the underlying guideline determinations themselves. As this Court explained in Koon:

> ... Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion. Section 3742(e), as enacted in 1984, provided '[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.' In 1988, Congress amended the statute to impose the additional requirement that courts of appeals 'give due deference to the district court's application of the guidelines to the facts.'

518 U.S. at 97. The lengthy analysis offered by the court below on the loss and financial-institution issues, USSG §§ 2F1.1(b)(1), 2F1.1(b)(7)(A), reads like the sentencing memorandum of a district court judge. Its analysis is essentially de novo; no "deference" of any kind was shown, much less "due deference."

The senior district judge who imposed sentence in this case presided over a five-week trial at which much evidence relevant to the sentencing issues was heard. The court then studied a group of lengthy pre-sentence investigation reports and considered the recommendations of the probation officer, and heard testimony and argument from both sides at a sentencing hearing. The judge then calculated the guidelines and imposed sentences which were (in his view) "no greater than necessary," 18 U.S.C. § 3553(b), without committing (so far as the court of appeals' decision shows) a single legal error. The reversal of those determinations in this case cannot be square with § 3742's regime of limited appellate review.

Sentencing appeals are overwhelming the workload of the courts of appeals. Part of that load is of the courts' own making -- the circuits have often failed to limit their exercise of authority in guideline sentencing appeals to that authorized by statute. The guidelines regime does convert many decisions which were formerly discretionary into determinations based on rules. The statute does not subject those rulings to de novo review, however. To articulate and demonstrate the proper application of the sui generis "due deference" standard of review established by 18 U.S.C. § 3742(e), the Court should grant a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, petitioners PHILIP ANDRE RENNERT, MICHAEL LEWIS MILLER, and GEORGE RAYMOND JENSEN pray that this Court grant their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming their convictions.

Respectfully submitted,

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APPENDIX A

194 F.3d 442
Fed. Sec. L. Rep. ¶ 90,668

UNITED STATES of America, Appellant in No. 98-1146
v.
David Rex YEAMAN, Appellant in No. 98-1102

Nos. 98-1102, 98-1146.

United States Court of Appeals,
Third Circuit.

Argued July 30, 1999.
Decided Oct. 15, 1999.

***446** Frank C. Razzano (Argued), Eric A. Bensky, Dickstein, Shapiro, Morin & Oshinsky, Washington, D.C., Attorneys for David Yeaman Appellant in No. 98-1102.

Michael R. Stiles, U.S. Attorney, Walter S. Batty, Jr., Assistant U.S. Attorney, Robert E. Courtney, III, Deputy U.S. Attorney, Andrea G. Foulkes (Argued), Assistant U.S. Attorney, Thomas V. Sjoblom, Special Assistant U.S. Attorney, Office of U.S. Attorney, Philadelphia, PA, Attorneys for United States of America, Appellant in No. 98-1146.

Paul A. Tufano, General Counsel, Commonwealth of Pennsylvania, Harrisburg, PA, and Alan C. Kessler, Andrew W. Allison (Argued), Buchanan Ingersoll, Philadelphia, PA, Attorneys for Amicus M. Diane

Koken, Insurance Commissioner of the Commonwealth of Pennsylvania.

BEFORE: SLOVITER, NYGAARD and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:

David Rex Yeaman, along with four other defendants, was convicted of various counts of conspiracy, wire fraud, and securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of three public companies, U.S. Card Investors, Inc. ("U.S. Card"), Omega Power ("Omega"), and American Family Services ("AFS"), to the Teale Network ("Teale"), a fraudulent network of offshore and domes-*447tic companies.[1] Teale represented these leased stocks as assets available to pay claims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Co. ("World Life"). When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless.

Yeaman has appealed from the jury's verdict and a sentencing adjustment. The government has cross-appealed the sentence imposed by the District Court.

[1] The Teale Network was organized and controlled by Alan Teale. Neither is a party to these proceedings but both are alleged to be unindicted coconspirators. We will refer to both collectively as "Teale."

I.

World Life became insolvent at some point in or before 1988. It hid its insolvency from regulators and its insureds, however, by placing a piece of land valued at $60,000 on its books as worth several million dollars. World Life issued the four group medical policies involved in this case in late 1989, in the spring of 1990, in the summer of 1990, and on December 1, 1990. Teale's contracts reinsuring these policies were entered on November 16, 1989, May 30, 1990, June 28, 1990, November 10, 1990, and November 11, 1990. Pursuant to these agreements, Teale assumed 100% of the liability under the four group medical insurance policies issued by World Life in exchange for 92% of the premiums paid by World Life's insureds on those policies. These reinsurance transactions allowed World Life to reflect a reserve credit of approximately $6 million. Teale received total premiums from World Life of approximately $7 million under its reinsurance contracts. The indictment alleged that the conspiracy among Teale and the defendants existed from about May of 1990 to June of 1992.

In 1990, Philip Rennert created Forum Rothmore, which acted as an intermediary between Teale and publicly traded corporations that desired to lease their stock. Forum Rothmore entered into "surplus contribution agreements," known as RENN contracts, with Teale. The first RENN contract involving one of the defendants was executed on September 1, 1990. Yeaman was involved in a series of RENN contracts entered between December 1, 1990, and April 1, 1991.

Under the terms of these contracts, corporations leased their stock to Teale and authorized the sale of the stock if

necessary to pay claims under insurance policies that Teale had reinsured. The value of the stock leased was calculated by multiplying the number of shares by the market price. Teale then listed these shares at the same value on the financial statements presented to World Life. In exchange, Teale paid a percentage of the monthly leasing fees it received from World Life to Forum Rothmore, which in turn split the fees with the stock providers. Of the approximately $7 million Teale received, about $3.3 million was distributed to the defendants as rental fees for the leased securities.

Yeaman was president of Capital General Corporation ("Capital General"). Capital General assisted other companies in going public through mergers with existing shell corporations that had previously completed their SEC registration. After the merger, Capital General retained some interest in the corporations, and Yeaman handled the registration and promotion of the stock. National Stock Transfer ("NST"), a subsidiary of Capital General, was the transfer agent and performed the record keeping functions for the public corporations with whom Capital General dealt.

U.S. Card, Omega, and AFS were formed via mergers orchestrated by Yeaman and Capital General. U.S. Card was a small baseball card business operated in the home of the father of one of Yeaman's associates in Hull, Massachusetts. Its total *448 inventory was less than $50,000. Omega was a nearly insolvent business that bought and sold surplus high voltage power line equipment. Omega had minimal operations conducted by a sole proprietor who was desperately seeking capital for his business. AFS also had no significant assets or profit making activity. Yeaman was an officer and director of these three corporations.

In spite of the minimal value of these corporations, Yeaman purported to lease $8 million of U.S. Card stock, $2 million of Omega stock, and $2 million of AFS stock to Teale. In order to be able to attribute such high values to these stocks, Yeaman manipulated the market quotes and inflated the financial statements of these corporations. Moreover, while certain of these stocks were restricted, they were represented to be marketable and were transferred without any indication of their restricted status. Forum Rothmore assisted Yeaman in leasing these falsely-valued and restricted stocks. In short, securities were falsely held out by the defendants and Teale to be marketable and valuable, when, in fact, they were not marketable and were virtually without value.

In January 1991, the Pennsylvania Insurance Department began to investigate World Life's financial condition. On July 28, 1991, the Pennsylvania Insurance Commissioner declared World Life insolvent and ordered its liquidation. Since Teale had been paying insurance claims with recently received premiums and had no other significant assets to draw upon, this liquidation deprived Teale of the ability to pay further claims.

The Pennsylvania Life and Health Insurance Guarantee Fund is a state fund authorized by statute to pay outstanding liabilities of licensed Pennsylvania companies that become insolvent. The Guarantee Fund is financed by Pennsylvania insurance companies. When World Life was liquidated, the Guarantee Fund paid the outstanding group medical reinsurance claims left unpaid as a result of the fraud. The unpaid claims totaled over $6 million.

In February 1996, Yeaman was indicted in the Eastern District of Pennsylvania and charged with one count of conspiracy and multiple counts of wire and securities fraud. The conspiracy charge included an allegation that Yeaman failed to disclose in SEC and NASD filings that he "previously had been found to have violated the securities laws." (A.116, Count 1 ¶ 6(o)(2)). This allegation was incorporated into the wire and securities fraud counts. Yeaman moved to strike this language from the indictment on the ground that he had no duty to disclose former securities law violations and/or that he did disclose the information required by law.

The District Court denied Yeaman's motion because it determined that if certain predicate facts could be established, Yeaman had a duty to disclose five securities-related administrative proceedings. The government later introduced two of these proceedings into evidence. One proceeding was a 1988 SEC administrative action against NST that resulted in a censure order. *See In the Matter of National Stock Transfer, Inc.*, 41 S.E.C. Docket 1219 (1988). The other proceeding was an SEC investigation that began in 1987 and culminated in a cease and desist order entered against Yeaman and Capital General in 1993. *See In the Matter of Capital General Corp.*, 54 S.E.C. Docket 1322 (1993). A third proceeding, in which the Oregon Department of Insurance and Finance entered a cease and desist order against Yeaman and Capital General, was admitted by stipulation of the parties. *See In the Matter of Capital General Corp. and David Yeaman*, E7-49 (Oregon Dept. of Ins. & Finance, April 28, 1988).

After a four week trial, the jury, by general verdict, convicted Yeaman of the one count of conspiracy,five

counts of wire fraud, and three counts of securities fraud. At the sentencing hearing, the District Court assigned Yeaman an offense level of 11, which included a one-point upward departure *449 for causing a loss of confidence in an important institution. The District Court found no monetary loss attributable to Yeaman and refused to impose adjustments for jeopardizing the safety of a financial institution and use of special skills. The District Court sentenced Yeaman to 14 months imprisonment and a $20,000 fine.

II.

Yeaman first contends that his conviction must be reversed because the jury's general verdict may have been based on an improper legal theory. Yeaman argues that the District Court erred in concluding that he had a duty to disclose the 1988 SEC censure order entered against NST and the SEC's investigation that began in 1987 and led to a 1993 cease and desist order entered against Capital General and Yeaman. The admission at trial of evidence of these proceedings allowed the jury to consider Yeaman's nondisclosure of them in determining whether he was guilty of conspiring, wire fraud, and securities fraud. Yeaman seeks reversal and a new trial in which such evidence would be excluded. The District Court's legal conclusions with respect to these two proceedings are subject to plenary review.

A. 1988 SEC Administrative Proceeding against NST

Regulation S-K, 17 C.F.R. § 229.401, mandates that certain information pertaining to corporate management and control persons be included in the periodic reports that public companies file with the SEC. Item 401(f) of

that regulation requires disclosure of certain legal proceedings that occurred in the past five years and that are "material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant." Item 401(f)'s six subparagraphs list the types of legal proceedings that must be disclosed. Items 401(f)(3) and (4) require disclosure when "[s]uch person was *the subject of* any order, judgment, or decree, not subsequently reversed, suspended, or vacated" of a court of competent jurisdiction or federal or state authority, and the order, judgment, or decree was related to certain specified behaviors. 17 C.F.R. § 229.401(f)(3)-(4) (emphasis added).

Since Yeaman was an officer and director of U.S. Card and Omega, the government alleged that Item 401(f) of Regulation S-K required the 1989 and 1990 Form 10-K reports of these companies to disclose the 1988 SEC order entered against NST.[2] The 1988 order found that NST had violated various securities laws on a number of occasions,[3] censured NST, directed it to take corrective measures, ordered it to retain an independent outside accountant to report on the implementation of those measures, and required NST's president to execute an

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[2] Because AFS was a non-registrant and non-reporting company under the federal securities laws, Regulation S-K does not apply to it. (A.159 n. 16)

[3] In the course of the administrative proceeding against NST, the Commission found that NST willfully violated Sections 17(a)(3), 17(f)(1), (2), and (3), 17A(c), 17A(d) and Rules 17f-1, 17f-2, 17Ac2-1, 17Ac2-2, 17Ad-6, 17Ad-10, 17Ad-11, 17Ad-13 thereunder. (A.235-36)

affidavit verifying that the services of an independent accountant had been engaged. Yeaman was not a named party to the proceeding.

Before the District Court, Yeaman contended that Items 401(f)(3) and (4) only refer to persons who were "named" in the proceedings and thus that he had no duty to disclose the 1988 proceeding against NST. Concluding that this argument had no merit, the District Court contrasted the text of Items 401(f)(3) and (4) with that of Item 401(f)(2) in the same regulation. Item 401(f)(2) requires disclosure if the director or control person "was convicted in a criminal proceeding or is *a named* ***450** *subject of* a pending criminal proceeding." *See* 17 C.F.R. § 229.401(f)(2) (emphasis added). The District Court observed: "Although Item 401(f)(2) refers to 'named subject,' Item 401(f)(3) and (4) merely refer to 'the subject of,' which connotes a broader meaning than 'named subject.' Surely, if (f)(3) and (f)(4) meant only 'named subject,' the SEC could have explicitly stated so, as it did in (f)(2)." (A.150)

The District Court went on to note that the government had alleged that it possessed evidence demonstrating that: (1) Yeaman was the director and president of Capital General; (2) Yeaman owned more than 90% of Capital General's stock; (3) Yeaman owned and controlled NST through Capital General; (4) Yeaman was president of NST in 1988 and already was or became its director; and (5) NST and Capital General were affiliates as defined in Rule 405 of the Securities Act, 17 C.F.R. § 230.405. (A.150-51) The Court held that if the government could prove these allegations at trial, "then there would be no question that Yeaman was the 'subject of' [the 1988 order entered against NST]." (A.151)

On appeal, Yeaman continues to assert that he was not "the subject of" the 1988 proceeding within the meaning of 17 C.F.R. § 229.401(f)(3) and (4) because he was not a named party to that proceeding. In support of this argument, he cites to the Uniform and Integrated Reporting Requirements: Directors and Executive Officers, Securities Act Release No. 33-5949, 1978 SEC LEXIS 1031, at *24 (July 28, 1978), which states:

> Item 3 [now known as Item 401, or 17 C.F.R. § 229.401] makes it clear that disclosure of criminal convictions, criminal proceedings, orders, judgments, etc. is required only where the executive officer, director, or nominee for election as a director is a named party in the legal proceeding.

Yeaman avers that the word "criminal" in this SEC release does not modify the terms "orders" or "judgments," and that the "named party" limitation therefore applies equally to civil orders and judgments. He concludes that we should defer to this interpretation of § 229.401(f)(3) and (4) by the Commission.

In order to understand what Item 3 "makes clear," we must examine the above- quoted statement in context. Prior to 1978, Regulation S-K contained only Items 1 and 2. In 1976, the Commission proposed several amendments to Regulation S-K, including a new section requiring disclosures concerning directors and officers. Section (f) of this amendment as originally proposed is substantially similar to the current version of Item 401(f), except that Section (f)(2) required disclosure if "[s]uch person was convicted in a criminal proceeding ... or is *the subject of* a criminal proceeding which is presently pending." Disclosure of Management Background: Uniform Reporting Requirements, Exchange Act

Release No. 34-12946, 10 S.E.C. Docket 834, 1976 WL 15989, at *10 (Nov. 2, 1976) (emphasis added). In response to comments received on this proposed amendment, Item 3(f)(2), as it was known upon its adoption in 1978, was amended to read: "[s]uch person was convicted in a criminal proceeding or is *a named subject of* a pending criminal proceeding." Securities Act Release No. 33-5949, 1978 SEC LEXIS 1031, at * 40 (emphasis added). The SEC's statement in the release cited by Yeaman is thus explaining a change in the originally proposed section dealing solely with criminal proceedings. It is accordingly clear that the word "criminal" was intended to modify "orders, judgments, etc." as well as "convictions" and "proceedings." We find it equally clear that the District Court properly regarded the difference between "named subject" in Item 401(f)(2) and "subject" in Item 401(f)(3) and (4) as deliberate and significant and properly concluded that the latter term is a broader concept. We thus reject Yeaman's reading of Item 401(f)(3) and (4).

***451** *B. SEC Investigation of Capital General and Yeaman between 1987-1990*

The anti-fraud provisions of the securities laws impose a duty to disclose material facts that are necessary to make disclosed statements, whether or not mandatory, not misleading. *See* 15 U.S.C. §§ 77q(a), 77x. The District Court held that Yeaman violated this duty by failing to disclose, in the Form 10-K reports filed by Omega and U.S. Card in March 1990, that he and Capital General had been the subject of an SEC investigation since 1987.[4]

[4] In 1993, after a five year investigation, the SEC ordered

The 10-K reports of these companies made no reference to this investigation and affirmatively asserted the following:

> Other than described above, neither the Registrant nor any of its officers or directors, to their best knowledge, is a party to any material legal proceeding or litigation which would impact the operations or the Registrant, and such persons know of no material legal proceedings, judgments entered, legal actions or litigation contemplated, or threatened which would impair operation of the Registrant in the future.

(A.152 (quoting 10-K reports)). The Court found that disclosure of the investigation was necessary in order to make not misleading the disavowal of knowledge of threatened proceedings that would impair the operations of the corporation. As a result of its holding, the Court allowed evidence of the investigation to be admitted at trial. While the Court's opinion stated that it found the relevant statements to be material and misleading, and thus violative of the securities laws, the jury instructions indicate that the jury was properly charged to make its own determinations in these respects.

On appeal, Yeaman insists that he did not know at the time of filing the 10-K reports that the SEC planned to commence litigation. He notes that the administrative proceeding that resulted from this investigation was not

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(cont'd)

Yeaman and Capital General to cease and desist from committing or causing further violations of Sections 5(a) and (c) and 17(a) of the Securities Act, and Sections 10(b) and 13(g) of the Securities Exchange Act, and Rules 10b-5, 12b-20, and 13d-1(c) promulgated thereunder. *See In the Matter of Capital General Corp.*, 54 S.E.C. Docket 1322 (1993).

instituted until June 22, 1992, and did not result in a cease and desist order until July 23, 1993. He insists that, while he knew of the investigation at the time of filing the March 1990 reports, he did not know that the investigation was focused on or might impact U.S. Card or Omega. As a result, he disagrees that a duty to disclose the investigation existed or that the affirmative statements contained in the 10-K reports were misleading in any respect. In response, the government points out, *inter alia*, that the investigation had been ongoing since 1987, that it instituted suit against Yeaman and Capital General in June of 1990 to enforce a subpoena duces tecum theretofore issued to them, and that the Court ordered compliance in July of 1990. Taken as a whole, the government argues, the evidence compelled the conclusion that Yeaman must have been aware of the scope and gravity of the investigation prior to March of 1990 and, given his knowledge of his own activities prior to March 1990, he must have known of the probability of a proceeding that would implicate U.S. Card or Omega.

We conclude that the government's evidence regarding the investigation was properly submitted to the jury for consideration as to whether the 10-K reports were materially misleading in light of the affirmative statement quoted above. While Yeaman argues that the District Court committed a legal error, his claim properly characterized is that the evidence was insufficient to support a conviction on the theory that the reports were materially misleading. When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the government and ask whether a "rational ***452** trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v.*

Dent, 149 F.3d 180, 187 (3d Cir.1998) (internal citations omitted). Under this standard, we believe the government has tendered sufficient evidence to support this theory. We need not base our rejection of Yeaman's argument on this ground, however.

We have concluded that 15 U.S.C. §§ 77q(a) and 77x provide a solid legal foundation for the government's theory of liability based on failure to disclose the SEC investigation. Assuming that there were insufficient evidence to support this theory, Yeaman nevertheless would not be entitled to a new trial because the government advanced other alternative, legally valid theories at trial that were supported by sufficient evidence. Under the teachings of *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), we are required in such circumstances to presume that the jury found the defendant guilty beyond a reasonable doubt on a theory supported by the evidence.

III.

Yeaman also requests reversal based on two challenges to the jury instructions. Review of the legal standard enunciated in a jury instruction is plenary, *see United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir.1997), but review of the wording of the instruction, *i.e.*, the expression, is for abuse of discretion. *See United States v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir.1995) (en banc). This Court reviews jury instructions to determine whether, "taken as a whole, they properly apprized the jury of the issues and the applicable law." *Dressler v. Busch Entertainment Corp.*, 143 F.3d 778, 780 (3d Cir. 1998) (internal quotation omitted).

A. Unanimity Instruction

Section 17(a) of the 1933 Act, 15 U.S.C. § 77q(a), makes it unlawful for any person "in the offer or sale of securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly," to do any of the following:

> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). The indictment alleged in the conjunctive that Yeaman engaged in conduct that came within all three of these subsections. At the conclusion of trial, the District Court declined to give the following instruction that Yeaman insisted should follow immediately after the Court read subsections (1)-(3) of Section 17(a):

> It is not necessary for the government to establish all three types of unlawful conduct in connection with the offer or sale of securities; any one will be sufficient for a conviction if you so find. However, you must unanimously agree upon which of the types of unlawful conduct the defendant engaged in. If you cannot agree on any one or more of the means, you must find the defendant not guilty.

The District Court instead charged as follows:

> The second element that the government must prove beyond a reasonable doubt is that in the offer or sale of the particular security the defendants did any one or more of the following:
>
> (1) employed a device, scheme, or artifice to de fraud, or
>
> (2) made an untrue statement of a material fact or omitted to state a material *453 fact which made what was said, under the circumstances, misleading, or
>
> (3) engaged in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon a purchaser, seller, or other person.
>
> It is not necessary for the government to establish all three types of unlawful conduct in connection with the offer, sale, or purchase of the particular security. Any one type of unlawful conduct will be sufficient for a conviction, if you so find such unlawful conduct.

Yeaman suggests that this instruction constitutes reversible error.[5]

It is well settled that a defendant in a federal criminal trial has a constitutional right to a unanimous verdict. *See United States v. Edmonds*, 80 F.3d 810, 814 (3d Cir.1996). This includes the right to have the jury instructed that in order to convict, it must reach unani-

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[5] Although the government contends that this issue was waived, we note that defense counsel submitted the above-quoted proposed jury instruction indicating the need for unanimous agreement as to which subsection of Section 17(a) was violated and objected, both at the instruction hearing and at the conclusion of trial, to the District Court's instructions to the extent that they deviated from their proposed instructions.

mous agreement on each element of the offense charged. It is equally well settled, however, that this does *not* mean one has a right to insist on an instruction requiring unanimous agreement on the means by which each element is satisfied. When a statute enumerates alternative routes for its violation, it may be less clear, however, whether these are mere means of committing a single offense (for which unanimity is not required) or whether these are independent elements of the crime (for which unanimity is required). In making this determination, *Edmonds* teaches that two questions must be addressed:

> First, did the legislature intend the different routes to establish separate "offenses," for which unanimity is required as to every fact constituting the offense, or different "means" of violating a single offense, for which unanimity is not required? Second, if the legislature intended the alternative routes to be mere means of violating a single statute, is the statute's definition of the crime unconstitutional under the Due Process clause?

Edmonds, 80 F.3d at 815.

We begin our analysis by noting that Section 17(a)first focuses on an historic event -- the offer or sale of a security utilizing an instrument of interstate commerce. It then requires that the defendants' conduct with respect to that offer or sale fall within one or more of three closely related categories -- a "device, scheme or artifice to defraud," an obtaining of money or property by material misrepresentation, or a transaction that operates as a fraud or deceit on a purchaser. While each category has its own parameters, *see United States v. Naftalin*, 441 U.S. 768, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979), they are largely overlapping categories and all fall within the

traditional understanding of the concept of fraud. Most conduct that falls within one is likely to satisfy another as well.

These characteristics of the relevant statute and the nature of the specific unanimity charge requested here distinguish this case from the situation involved in *Edmonds* and *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). The statute involved in those cases, the Continuing Criminal Enterprise Statute ("CCE"), requires that the defendant have engaged in a "continuing series of violations" of a broad range of specified criminal statutes. The indictments there charged numerous such violations and the defendants asked that the jury be instructed that it must unanimously agree on each violation it relied upon as satisfying the requirement of a "continuing series of violations." In both cases, the Courts declined to find that Congress intended "CCE predicate offenses to constitute mere means of [committing] a single ***454** CCE offense" and suggested that such a finding would raise serious questions under the Due Process Clause. *Edmonds*, 80 F.3d at 819. Both courts stressed that the "statute's word 'violations' covers many different kinds of behaviors of varying degrees of seriousness" and that failing to treat each violation as a separate element would create substantial risk that a guilty verdict might mask "wide disagreement among the jurors about what the defendant did, or did not, do." *Richardson*, 119 S.Ct. at 1711.

Section 17(a) does not cover "many different kinds of behavior of varying degree of seriousness" and the requested charge was not directed at the same concern identified in *Edmonds* and *Richardson*. The statute is limited to fraud in connection with an offer and sale of

securities in interstate commerce. The requested charge did not seek to require jury unanimity with respect to whether Yeaman engaged in the alleged market manipulation, the alleged representation of restricted securities as unrestricted, or the alleged failure to disclose material SEC proceedings. Thus its function would not have been to increase the assurance that Yeaman committed specific criminal conduct. Its only function would have been to require jury unanimity on whether Yeaman's conduct constituted a scheme to defraud, an obtaining of money by material misrepresentation, or a transaction that operated as a fraud on a purchaser, as those concepts are used in Section 17(a).

We are confident that the District Court's denial of the requested instruction did not in any way frustrate Congress's intent in passing Section 17(a) or jeopardize any fairness concept embodied in the Due Process Clause.[6] Indeed, we perceive no purpose that would have been served by putting the jurors to the task Yeaman's charge would impose on them -- a task that would require them not only to determine what Yeaman did but also to agree upon the outer limits of each of the subsections of Section 17(a) in this factual context.

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[6] In order to comport with due process, we have indicated that different means for committing an offense "must reflect notions of 'equivalent blameworthiness or culpability.'" *Edmonds*, 80 F.3d at 820 (quoting *Schad v. Arizona*, 501 U.S. 624, 643, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)). In light of the similarity of these three alternatives and the fact that each alternative has the same mental state requirement, we conclude that this requirement is met.

We find the most helpful precedent to be the decision of the Court of Appeals for the Ninth Circuit in *United States v. UCO Oil Co.*, 546 F.2d 833 (9th Cir. 1976). The statute there, 18 U.S.C. § 1001, provided:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or make or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

546 F.2d at 836. Each relevant count of the indictment was based on an identified document and charged the defendants both with having "made ... false writings ... knowing the same to contain false ... statements" and with having "falsified, concealed and covered up by trick, scheme and device material facts." The Court concluded that Section 1001 specified alternative means for committing a single offense and that, as a result, it was not necessary for "the jury, in arriving at a unanimous verdict, [to] agree on the particular means by which the offense was committed." The Court explained:

> On the face of it, the statute, framed in a single paragraph and providing a single penalty, does not suggest Congressional purpose to create more than one offense. Moreover, the statute is directed at a single evil, i.e., the "perversion" of "the ***455** authorized functions of governmental departments and agencies ... which might result from the deceptive practices described." *United States v. Gilliland*, 312

U.S. 86, 93, 61 S.Ct. 518, 522, 85 L.Ed. 598 (1941). The types of conduct enumerated all fall within the general understanding of what constitutes fraud. As the court put it in *Charles Hughes & Co. v. Securities and Exchange Comm'n*, 139 F.2d 434, 437 (2d Cir. 1943):

> "The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other."

See also, *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir.1965).

It is reasonable to conclude, therefore, that Congress was concerned with proscribing the prohibited result rather than particular kinds of conduct. That being so, consistency calls for interpreting the enumeration of different kinds of conduct in the statute as reflecting different modes of achieving that result, not separate and distinct offenses ....

546 F.2d at 836. We find this reasoning equally cogent here.

B. Restricted Stock Instruction

Yeaman also argues that the District Court improperly instructed the jury that it could find a Securities Act violation based solely on his having held and transferred restricted stock. According to Yeaman, the charge relieved the government of its burden of proving that Yeaman engaged in fraud by misrepresenting the restricted stock as free-trading stock.

After instructing the jury on the elements of Section 17(a), the judge noted that "the government contends that certain of the defendants engaged in the fraudulent

sale of restricted stock." (A.4159) The judge informed the jury that restricted stock is stock acquired directly or indirectly from an issuer in a transaction not involving any public offering; and that such stock is deemed "restricted" because there are restrictions on its resale to the public. *See* 17 C.F.R. § 230.144. The judge then gave the instruction we have set forth in the margin.[7]

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[7] Now, the Government contends that the defendants made use of certain restricted securities in furtherance of some fraudulent acts and practices by distributing and contributing those stocks to the off-shore reinsurance companies. I have already defined for you what a restricted stock is and the requirements under the law if and when the restricted stock is going to be sold. If you find that the defendants held restricted stock, then you may find the defendants engaged in acts, practices and courses of business that operated as a fraud and deceit. And that they made material misrepresentations by manipulating the price of the stocks by contributing them to the off-shore reinsurers who placed them on their financial statements to give the appearance of highly valued assets, by participating in the misrepresentations made by their coconspirators who used those financial statements to misrepresent the financial well being of the off-shore reinsurers when contracting with a primary insurance company in Pennsylvania. And by misrepresenting that these stocks could be liquidated to meet claims when they could not.

Now, the Government also contends that the defendants made use of certain restricted securities in furtherance of the fraudulent acts and practices by distributing and pledging these restricted stocks to the banks which held and maintained the escrow accounts. If you find that the defendants held restricted stock, then you may find that the defendants engaged in acts, practices and courses of

***456** We do not find this jury instruction to be legally inaccurate or improper in any respect. The purpose of the Court's instruction was to provide examples of the way that the defendants may have violated Section 17(a), assuming that the defendants used restricted stock in the course of their dealings. To find defendants guilty under one of these possible scenarios, the jury first had to find that defendants held restricted stock. The implication of the Court's statement "[i]f you find that the defendants held restricted stock," is that if the jury did not so find,

_____(cont'd)

> business that operated as a fraud and deceit and made material misrepresentations in connection with the deposit of those stocks into the escrow accounts, if you find one or more of the following.
>
> First, if you find that the defendants contributed through Forum Rothmore and World Re and into the escrow accounts stock positions they controlled in one or more of the five companies. And at the time they did so, they had not held the Rule 144 stock long enough to meet the two or three year holding I described previously. Or secondly, Forum Rothmore became an underwriter and was thus engaged in an unlawful distribution. An underwriter is defined by statute to mean any person who either has purchased from an issuer, with a view to or offers or sells for an issuer in connection with the distribution of any security. Or any person who participates or has a direct or indirect participation in any such undertaking. Or third, they engaged in acts, practices or courses of business that operated as a fraud on the escrow accounts when they engaged in an unlawful distribution and had violated the rules concerning the sale of restricted stock.
>
> It's not necessary you find the defendants engaged in all three of these courses of business or conduct. Anyone (sic) is sufficient.

(A-4164-4166).

then their consideration of this theory was precluded. If the jury did find that the defendant held restricted stock, then the jury was obliged to consider whether the evidence supported a finding that the defendants engaged in transactions with these stocks that would operate as a fraud or deceit. Thus, we find no error in the Court's restricted stock instruction.

IV.

In combination, the parties raise four sentencing issues. The government finds three flaws in the District Court's application of the Sentencing Guidelines: (1) the finding of no loss under U.S.S.G. § 2F1.1; (2) the failure to impose a four-level increase under U.S.S.G. § 2F1.1-(b)(6) for a substantial effect on a financial institution; and (3) the rejection of a special skills enhancement under U.S.S.G. § 3B1.3. Yeaman challenges the District Court's upward departure based on its finding that Yeaman's fraudulent acts resulted in loss of confidence in an important institution.

The standard of review of a district court's interpretation and application of the Sentencing Guidelines is plenary. *See United States v. Hallman*, 23 F.3d 821, 823 (3d Cir.1994). Findings of facts are measured by the clearly erroneous test. *See United States v. Hillstrom*, 988 F.2d 448, 450 (3d Cir.1993). This Court's review of a district court's decision to depart upward is plenary as to whether the increase was permissible. We review the reasonableness of the degree of the departure for an abuse of discretion. *See United States v. Kikumura*, 918 F.2d 1084, 1098, 1110 (3d Cir.1990).

A. Calculation of Fraud Loss under U.S.S.G. § 2F1.1

Section 2F1.1(a) of the Sentencing Guidelines establishes a base offense level of six for offenses involving fraud and deceit. *See* U.S.S.G. § 2F1.1.[8] Pursuant to Section 2F1.1(b), the base offense level must be increased according to the size of the loss. This Court's precedents establish that "'fraud loss is, in the first instance, the amount of money the victim has actually lost,'" *United States v. Coyle*, 63 F.3d 1239, 1250-51 (3d Cir.1995) (quoting *United States v. Kopp*, 951 F.2d 521, 523, 536 (3d Cir.1991)). However, "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than actual loss." Application Note 7 to U.S.S.G. § 2F1.1. While the greater of actual loss and intended loss is the preferred measure, there are situations in which the defendant's gain can appropriately be used as a measurement of loss. A court may look to a defendant's gain as an alternative measure but only "[w]hen if it is not feasible to estimate with reasonable accuracy the victim's loss [or intended loss] and where there is some logical relationship between the victim's loss and the defendant's gain so that the latter can reasonably serve as a surrogate for the former." *United States v. Dickler*, 64 F.3d 818, 826 *457 (3d Cir.1995) (indicating, by way of example, that proceeds from resale of object taken could provide estimate of loss because sale would establish approximate market value of object). Additionally, "the loss need not be determined with precision. The Court need only make a reasonable estimate of the loss given the

[8] All references to the Sentencing Guidelines are to the 1997 version.

available information." Application Note 8 to U.S.S.G. § 2F1.1.

The relevant conduct provision of the Sentencing Guidelines, § 1B1.3, provides that specific offense characteristics, -- in this instance the loss amount that should be attributed to the defendant under § 2F1.1, -- are to be determined on the basis of the following:

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> * * * * * *
>
> (3) all harm that resulted from the acts and omissions specified in [the above] subsections ..., and all harm that was the object of such acts and omissions.

U.S.S.G. § 1B1.3. In the context of a jointly undertaken criminal activity, Application Note 2 indicates that the conduct attributable to a defendant does not include the conduct of other participants prior to defendant's joining the activity, even if the defendant knows of that conduct. *See* Application Note 2 to U.S.S.G. § 1B1.3. On the other hand, one who commits to a scheme to defraud already in progress is responsible from that point on for

all reasonably foreseeable loss occasioned by other participants acting in furtherance of the scheme.

We have previously held that Section 1B1.3(a)(3) establishes a causation requirement when determining actual loss. *See United States v. Neadle*, 72 F.3d 1104, 1114-15 (3d Cir.1996) (Becker, J., concurring in part and dissenting in part) ("[T]he plain meaning of 'resulted from' connotes causation."), *opinion amended by* 79 F.3d 14 (3d Cir.1996); *United States v. Evans*, 155 F.3d 245, 253 (3d Cir.1998) ("[T]he actual loss determination must be predicated on the harm caused by [defendant's] offenses.").

Where the defendant takes something without giving anything to the victim in return, the value of the thing taken reflects the victim's loss. However, where the defendant gave something of value in exchange for what was fraudulently taken, the victim's loss is the difference between the value of what he or she gave up and the value received in exchange. *See United States v. Dickler*, 64 F.3d 818, 825 (3d Cir.1995).

In the Pre-Sentence Investigation Report, the Probation Office recommended a loss calculation of $6.4 million and the addition of 14 levels pursuant to Section 2F1.1(b)(1). The $6.4 million amount reflects the unpaid medical reinsurance payments owed by Teale to World Life pursuant to the terms of the reinsurance contracts and ultimately paid by the Guarantee Fund. Nonetheless, in sentencing the defendants, the District Court determined that the offense involved no loss. The government contends that the Court erred in several ways: (1) by determining that the offense involved no actual loss; (2) by failing to consider the loss that Yeaman and his business associates intended to impose;

and (3) by failing to account for the fact that Yeaman and his co-defendants collectively reaped $3.3 million as a result of the offense.

*458 In determining that no actual loss occurred, the District Court focused on the $6.4 million loss figure contained in the sentencing report. The Court concluded:

> The indisputable fact is that [the] overwhelming majority of harm or loss to the victims occurred prior to any of the defendants joining the conspiracy. Indeed the evidence shows that the loss that the Government is claiming, namely $6.4 million in unpaid claims, [on the insurance policies], was incurred as liabilities by World Life prior to any conduct by the defendants here. In effect, the defendants could not have made the liabilities greater. The stock they contributed merely failed to cover the liabilities incurred ....

(A.658-59). The Court did not explicitly make any findings with respect to intended loss. The District Court also did not address the gain acquired by Yeaman and the other participants in the scheme.

The District Court found no actual loss because it concluded that World Life had issued the policies, and was thus committed to pay the $6.4 million in claims, prior to the defendant's misrepresentations. We find the District Court's analysis flawed for several reasons.

Yeaman and his co-defendants agreed to participate in a scheme that would enable Teale to collect millions of dollars in premiums from World Life in exchange for virtually worthless reinsurance. The victims of the scheme were World Life and the beneficiaries of the group medical policies. The record demonstrates that

the defendants were fully aware of the use to be made of their misrepresentations in the stock leasing agreements and it strongly suggests that these misrepresentations were essential to Teale's continued collection of those premiums. The reinsurance contracts provided for their termination in the event of the reinsurer's insolvency. Without the assets of the defendants and the resulting appearance of solvency, the most reasonable inference is that World Life would have ceased paying premiums to Teale long before it eventually did. The District Court failed to make any finding, however, as to the likelihood of a causal connection between the misrepresentations of the defendants and Teale's collection of premiums after the defendants committed themselves to support the scheme.

If there was a causal connection between the misrepresentations of Teale, Yeaman, and the other conspirators and the continued receipt by Teale of premiums after Yeaman joined the scheme, Yeaman is responsible for an actual loss equal to the premiums received after he joined the scheme less any amount paid by Teale in satisfaction of policy claims out of those premiums or the sale of the reinsurance assets. Yeaman would be responsible in this event for an actual loss whether or not World Life issued its group policies or entered into its reinsurance contract prior to Yeaman's entry on the scene. *See United States v. Dickler*, 64 F.3d at 825.

Because Teale collected the premiums from World Life as a result of jointly undertaken criminal activity, neither we nor the District Court on remand need determine whether Yeaman in particular caused World Life to cede these amounts to Teale. Under Section 1B1.3(a)(1),

Yeaman is accountable, not only for his own acts, but also for the conduct of others that was: (1) in furtherance of the jointly undertaken criminal activity; (2) within the scope of the criminal activity Yeaman agreed to jointly undertake; and (3) reasonably foreseeable in connection with that criminal activity. *See* U.S.S.G. § 1B1.3(a)(1)(B); Application Note 2; *United States v. Evans*, 155 F.3d 245, 253-54 (3d Cir.1998). The record contains ample evidence demonstrating that Yeaman understood the extent of Teale's scheme, including the roles of other parties to the scheme and the need to place a diversity of stocks on Teale's financial record in order to pass muster with World Life and insurance regulators. Accordingly, we have no difficulty concluding that Yeaman is responsible for the acts of all others involved ***459** in the scheme that occurred after he entered the conspiracy, and thus all of the premiums ceded by World Life as a result of their combined acts.

The record indicates that Yeaman entered into his first RENN contract on December 1, 1990. On remand, if the District Court finds a causal connection between the conduct of Teale and the other co-conspirators and Teale's continued receipt of premiums, it will determine when before December 1, 1990, Yeaman committed himself to the conspiracy and will calculate the amounts received by Teale in premiums under the reinsurance contracts after that date. It should then reduce that amount by the total claims paid by Teale. If these amounts cannot be calculated with precision, reasonable estimates will suffice.

The premiums paid by World Life after Yeaman's decision to enter the scheme may not, however, be the only actual loss measure that this record will support. In

United States v. Neadle, 72 F.3d 1104 (3d Cir.1995), we upheld a district court's determination that the actual loss caused by a defendant who issued fraudulent insurance policies was the amount of unpaid claims of policyholders. The record revealed that the defendant misrepresented the amount of his initial capital in order to get into the insurance business and engaged in fraudulent conduct to perpetuate his business. We determined that, but for his fraudulent acts, the defendant would not have been able to enter and remain in the insurance business. We concluded that the insureds' unpaid claims provided a reasonable estimate of the harm resulting from the defendant's fraudulent scheme. *See also United States v. Krenning*, 93 F.3d 1257, 1270 (5th Cir.1996) (holding that actual loss caused by defendant who disguised the insolvency of his insurance company and continued to sell policies was losses of policyholders). We see no reason why the *Neadle* analysis should not similarly apply where reinsurance is sold based on a fraudulent inflation of the value of the reinsurer's assets.

In this case, Teale could not have entered and remained in the business of reinsuring World Life but for its fraudulent misrepresentations. Although the District Court made no finding on the issue, the record would also appear to us to support the proposition that World Life was not capable of insuring any of the four group medical policies without having received a commitment for 100% reinsurance. It follows that if the Teale fraudulent reinsurance contracts had not been available, World Life would either have secured other reinsurance or would not have issued the group policies involved. If reinsurance from a solvent reinsurer had been obtained, all claims under the policies would have been paid to the

reinsurer; if the group policies had not been issued, the employers who purchased the policies from World Life would have obtained group medical coverage from another source and all claims of the beneficiaries would have been paid in full. In either event, under the teachings of *Neadle*, there would have been a causal nexus between the fraud and all unpaid claims.

While it is true, as Yeaman stresses, that he cannot be held responsible for the consequences of Teale's misrepresentations before he joined the conspiracy, he would be responsible for all loss under a group policy reinsured by Teale after he committed to the scheme. The timing of Yeaman's own misrepresentation would be immaterial. While Yeaman's initial RENN contract was entered into on December 1, 1990, a few weeks after the last of the reinsurance contracts, the record suggests that his decision to join the fraudulent scheme may have predated at least some of those reinsurance contracts.

By identifying these ways in which the record suggests that Yeaman may be responsible for an actual loss suffered by World Life and the beneficiaries of its group medical policies, we do not foreclose the District Court from concluding, after ***460** an analysis consistent with this opinion, that the government has failed to carry its burden of proving a causal nexus by a preponderance of the evidence. Neither do we intend to indicate that a careful analysis of the voluminous record here could not find support for other theories involving such a nexus. Even if Yeaman joined the scheme after all of the reinsurance contracts had been entered, for example, it does not necessarily follow that he is not responsible for any of the unpaid claims arising under the group policies. Neadle emphasizes that an insurer's continued fraud may

allow it to remain in business longer than it otherwise would. Here, in the absence of Yeaman's participation in the scheme, Teale's insolvency may have surfaced earlier than it did and less loss may have been occasioned to World Life and the beneficiaries of its group policies than was in fact occasioned by the end of the conspiracy. We do not mean to foreclose the District Court on remand from pursuing this or any other theory of actual loss suggested by the record. We hold only that the District Court's limited factual findings do not support its conclusion that no actual loss was occasioned.

The government also contends that the intended loss in this case exceeds the actual loss and should, therefore, be used in applying U.S.S.G. § 2F1.1. It argues that the intended loss is the face value of the stock provided by Yeaman and others under the RENN contracts and reported in Teale's financial statements. We do not agree that Yeaman and his co-conspirators intended to cause a loss equal to the amount of the represented value of the leased stocks. Intended loss refers to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims. *United States v. Kopp*, 951 F.2d 521, 529-531 (3d Cir.1991). Here, Yeaman and the others undoubtedly hoped that their fraudulently inflated securities would never have to be sold and that the scheme would continue for the indefinite future. The loss that they intended was the premiums Teale would receive less any payment of claims necessary to keep the scheme alive. We express no view at this juncture as to whether the current record will support a finding of an intended loss in excess of the actual loss.

Additionally, while we do not foreclose the District Court from considering the gain of Yeaman and the others on remand, their gain would not appear to us to be a helpful alternative in this factual context. That gain would appear to be limited to an amount equal to the minimum actual loss we have held to be appropriate, i.e., to the premiums received by Teale after Yeaman's joinder, less any claims paid in order to maintain the scheme, including any amounts paid by Teale in satisfaction of the outstanding claims upon liquidation.

B. Failure to Apply Four Level Increase Under Section 2F1.1(b)(6)

Section 2F1.1(b)(6) of the United States Sentencing Guidelines provides:

> If the offense--
>
> (A) substantially jeopardized the safety and soundness of a financial institution; or
>
> (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,
>
> increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

U.S.S.G. § 2F1.1(b)(6). Application Note 15 states:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active ***461** operations; or was placed in substantial jeopardy of any of the above.

In the course of rejecting an enhancement under Section 2F1.1(b)(6), the District Court explained:

> Based on the evidence the Court finds that the defendants did not substantially jeopardize the safety or soundness of World Life. As with respect to the loss calculation, the Government must demonstrate a causal connection between the defendants' conduct and the safety and soundness of the institution.
>
> In this case the conduct of the defendants could not have caused World Life to become insolvent. World Life had been insolvent as a matter of pure accounting long before any of the defendants charged conduct. Clearly the conduct of the defendants could not have caused World Life to become insolvent because it already was.
>
> Finally, the evidence does not establish that defendants' conduct caused any of the other consequences in application note 15.

(A.659-60).

While the government concedes that the reinsurers did not cause World Life's insolvency, they nonetheless contend that the Court erred in refusing to order an enhancement under Section 2F1.1(b)(6)(A).[9] The government maintains that the conduct of Yeaman and the other parties to the scheme substantially reduced benefits to insureds and "left the company 'unable on demand to refund fully any deposit, payment, or investment' or meet its obligations to insureds." Government Br. at 117.

Consistent with our previous conclusion that the District Court's factual findings do not support its

[9] The government has not raised the issue of whether an enhancement was appropriate under Section 2F1.1(b)(6)(B).

holding of no actual loss, we conclude that the District Court also erred in holding that Yeaman did not substantially jeopardize the safety and soundness of World Life by (1) substantially reducing benefits to World Life's insureds and (2) placing World Life in a position such that it was unable to refund premiums that were paid in exchange for non-existent coverage. Yeaman and the others received several million dollars of premiums from World Life that should have gone towards paying insureds' claims or refunding their premiums. *See United States v. McDermot*, 102 F.3d 1379 (5th Cir.1996) (holding that, even though victim corporation was insolvent independent of fraud,finding of actual loss of $5-10 million caused by defendants' fraud was irreconcilable with finding that defendants did not substantially reduce benefits to insureds or cause corporation to be unable to refund deposit, payments, or investments).

Accordingly, we will remand for application of Section 2F1.1(b)(6)(A).

C. Upward Departure for Loss of Confidence in Important Institution

Yeaman appeals the District Court's decision to impose a one-level upward departure based on the loss of confidence in an important institution that resulted from his fraudulent acts. Yeaman's challenge is two-fold. He argues that the Court abused its discretion by both (1) concluding that this case fell outside the "heartland" of typical fraud cases; and (2) determining that the record supported the imposed departure.

We begin our analysis by noting that the Commission conceives of each offense guideline as "carving out a

'heartland,' a set of typical cases embodying the conduct that each guideline describes." U.S.S.G., Ch. 1, Pt. A intro. p.s. 4(b). In the unusual case where a defendant's conduct falls outside the typical "heartland," the court may consider a departure from the guidelines range. *Id.* A district court may impose a sentence outside the guideline range ***462** where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see* U.S.S.G. § 5K2.0.

As this Court explained in *United States v. Iannone*, 184 F.3d 214, 226 (3d Cir.1999):

> The Supreme Court provided additional guidance on departures in *Koon v. United States*, 518 U.S. 81, 95, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996), instructing courts to apply the following analysis when considering a § 5K2.0 departure. First, identify the factor or factors that potentially take the case outside the Guidelines' "heartland" and make it special or unusual. *Id.* at 95, 116 S.Ct. 2035. Second, determine whether the Guidelines forbid departures based on the factor, encourage departures based on the factor, or do not mention the factor at all. *Id.* at 94-95, 116 S.Ct. 2035. Third, apply the appropriate rule: (1) if the factor is forbidden, the court cannot use it as a basis for departure; (2) if the factor is encouraged, the court is authorized to depart if the applicable guideline does not already take it into account; (3) if the factor is discouraged, or encouraged but already taken into account by the applicable guideline, the court should depart only if

the factor is present to an exceptional degree, or in some other way makes the case different from the ordinary case in which the factor is present; or (4) if the factor is unmentioned, "the court must, after considering the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole, decide whether [the factor] is sufficient to take the case out of the Guideline's heartland." *Id.* at 95-96, 116 S.Ct. 2035 (internal citation and quotation marks omitted).

In the instant case, the District Court concluded that a resulting loss of confidence in an important institution took this case out of the "heartland" of fraud cases. The Commission has explicitly encouraged departures based on this factor. Application Note 10 to U.S.S.G. § 2F1.1 provides a nonexclusive list of circumstances in which the loss calculated pursuant to Section 2F1.1 "does not fully capture the harmfulness and seriousness of the conduct." Application Note 10 to U.S.S.G. § 2F1.1 (1997). Causing a loss of confidence in an important institution is identified as one such circumstance. *See* Application Note 10(e).

Because the Guidelines suggest that a finding of loss of confidence in an important institution is sufficient by itself to place a case outside the "heartland" of typical fraud cases, we limit our examination to whether the Court properly considered the evidence put forth by the government and whether this evidence was sufficient to support a finding of loss of confidence in an important institution.[10]

[10] In Yeaman's reply brief, he asserted for the first time that Section 2F1.1(b)(6) of the Guidelines already takes loss of confidence into account, at least when the important

At sentencing, the government argued that the defendants' scheme had caused a loss of confidence in both the insurance industry and the stock market. In support of its arguments, the government submitted a series of letters from policyholders of World Life and a letter from *463 William McLucas, the Director of Enforcement at the SEC. Although it granted the departure, the Court did not state whether it based the departure on a finding of loss of confidence in the insurance industry, the stock market, or both.

Yeaman relies on this Court's holding in *United States v. Neadle*, 72 F.3d 1104 (3d Cir.1996) to support his argument that the District Court departure has inadequate record support. In *Neadle*, the defendant, as we have noted, had been convicted of mail fraud in connection with the formation and maintenance of an insurance company. The district court imposed a one point upward departure on the ground that "'[t]he offense itself contributed materially to the destruction of the reputation of the insurance industry in the territory.'" *Id.* at 1112 (quoting district court). This Court held that this upward departure was improper. We explained: "[T]he

_____(cont'd)

institution at issue is a financial institution. As a result, Yeaman contends that the Court cannot grant an upward departure based on Application Note 10(e) unless the instant offense involved exceptional aggravating circumstances. While Yeaman has waived this argument by failing to raise it sooner, we nonetheless note that it has no merit in this particular case where the financial institution at issue for purposes of Section 2F1.1(b)(6), World Life, is an institution separate and distinct from the "important institution" supporting the Court's decision to upwardly depart pursuant to Section 5K2.0. *See* discussion *infra*.

court based the upward departure not on sworn testimony but on unsupported judicial conclusion. Such judicial speculation cannot provide the basis for an upward departure." *Id.* We emphasized that the government, when asked for its evidence supporting the argument for a departure, had merely cited conversations with fifteen insureds of the fraudulent company "who did not hold the insurance industry in very high regard, meetings with people on the street, and evidence from reading newspapers." *Id.* at 1112 n.8 (internal quotation omitted).

Relying on the language in *Neadle*, Yeaman contends that the upward departure for loss of confidence in an institution in this case was similarly based on unsupported judicial conclusions rather than competent evidence. First, he notes that none of the materials submitted by the government in support of the upward departure consisted of sworn testimony. Second, he argues that the letters from policy holders tendered by the government demonstrate nothing more than their frustration occasioned by World Life's failure, *i.e.* their lack of coverage and resulting out-of-pocket expenses or inability to receive health care services. Finally, he observes that the SEC letter speaks generally about the deleterious effects of fraud on the securities market, but does not claim that Yeaman's conduct actually contributed to a loss of public confidence in the market.

We do not understand *Neadle* to hold that unsworn, but reliable and probative evidence cannot be relied upon by a sentencing court to support a departure. The law is clearly to the contrary. Rather "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information

without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3; *United States v. Brothers*, 75 F.3d 845, 848 (3d Cir.1996).

With respect to the letters from World Life's insured, we find ourselves in agreement with Yeaman. As he points out, these letters demonstrate the policyholders' frustration in the past with World Life, their inability to receive benefits from World Life after having paid their premiums, and the resulting financial strain as medical problems arose. None of these letters suggest that World Life's insureds will be unlikely to purchase medical insurance in the future.

Nonetheless, the government's evidence is sufficient to support a finding of loss of confidence in the stock market. The McLucas letter provides an expert opinion that manipulation of the market through means like those employed by Yeaman destroy confidence in the securities market and that a fraudulent scheme with respect to a few stocks can have a pervasive, detrimental effect. As Director McLucas explained:

> [W]hen the integrity of the secondary market is undermined by a manipulation scheme involving even only a few stocks, ***464** there inevitably is a more persuasive effect on the securities markets as a whole. When investors lose confidence in the securities markets as a result of market manipulation of a particular stock market integrity as a whole is diminished. When that happens, investment in securities of other issurers is impeded.

(A.495).

We find that the McLucas letter along with the other evidence concerning Yeaman's conduct provides a satisfactory predicate for the District Court's upward departure. It is not necessary in a situation of this kind that the government produce someone whose confidence in the institution has diminished as a result of the defendants' conduct. We think it clear that a sentencing court may infer that the requisite loss of confidence has occurred based on the evidence concerning the character of the fraud, and expert opinion testimony like that of Director McLucas regarding the impact of that kind of fraud on the particular institution involved. Moreover, where the Court can draw the inference that some loss of confidence in the institution occurred, that will suffice; it is not necessary that the loss from this particular scheme be further quantified. *See United States v. Rowe*, 999 F.2d 14 (1st Cir.1993) (permitting inference of loss of confidence in the health insurance industry based solely on the character of the defendant's fraudulent scheme).

On remand, the District Court should reevaluate its decision to impose a one level upward departure in light of our observations concerning the letters of World Life's insured. If it infers that some loss of confidence in the stock market has occurred, it may reimpose its original departure.

D. Failure to Apply Two Level Enhancement Under Section 3B1.3

Section 3B1.3 provides:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjust-

ment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

Application Note 2 states:

> "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

The government contends that the District Court erred in refusing to impose an enhancement on Yeaman based on his specialized knowledge of the stock market as a prior stock broker and his particular knowledge acquired over decades of experience in the over-the-counter (bulletin board) market, the inner workings of a brokerage firm, and use of a transfer agent. While the Guideline itself precludes the adjustment if the abuse of skill is included in the base offense level or specific offense characteristic, the District Court declined to impose the enhancement because "the basis for the proposed enhancement, constitutes part of the elements of the *offense* for which he has been convicted." (A.710 (emphasis added)). The District Court believed that an enhancement for use of special skills would amount to "double counting."

We hold that the District Court misconstrued the applicable law when it looked to whether the special skill used was part of the statutory offense, rather than included in the Guideline applicable to that offense.[11] The relevant

[11] Yeaman notes that the government agreed, at the sentencing hearing, that the issue "was whether or not the special skill used is so part and parcel of the overall offense as to constitute an element." (A.716) Nonetheless, we do not find

Guideline *465 here, which applies to all fraud cases, neither makes reference to a special skill nor directs that Section 3B1.3 not be applied. It follows that Section 3B1.3 must be applied if its factual predicates are satisfied. Accordingly, we will remand for initial findings as to whether Yeaman possessed special skills within the meaning of Section 3B1.1 and, if so, whether he used these skills to significantly facilitate the commission of the offense.[12] While Application Note 2 does not specifically recognize stock brokers as persons possessing special skills in its list of examples, enhancements based on a defendant's special skills he or she developed as a broker or financier and used in the commission of securities fraud are proper in some circumstances. *Cf. United States v. Connell*, 960 F.2d 191 (1st Cir.1992) (holding that stockbroker's ability to launder large amount of stock while shielding the true owner's identity in a way that a lay person could not do without attracting scrutiny

(cont'd)

that the government has waived the right to assert the correct state of the law. The government's argument appears to be due to mere inadvertence rather than a calculated attempt to mislead the District Court. In fact, the government stated the law correctly in its sentencing memorandum. *See In re Chambers Development Co.*, 148 F.3d 214, 229 (3d Cir.1998) ("Asserting inconsistent positions does not trigger the doctrine of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage.").

[12] The government contends that the District Court made this required factual finding. The government cites the Court's statement that "this program ... was not devised by Mr. Miller, but by those who were expert in the field of manipulating the stock." (A.718-19) We do not find this statement to be sufficiently explicit on this point.

supported use of special skill enhancement of sentence for violation of federal currency reporting requirements).

V.

Based on the foregoing analysis, we will affirm Yeaman's conviction on all counts and the District Court's imposition of a one-point upward departure based on loss of confidence in an important institution. We will remand for application of U.S.S.G. §§ 2F1.1, 2F1.1(b)(6), and 3B1.3.

APPENDIX B

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 98-1101 and 98-1145

UNITED STATES OF AMERICA
Appellant in No. 98-1145

V.

PHILIP ANDRE RENNERT
Appellant in No. 98-1101

On Appeal From The United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 96-cr-00051-1)
District Judge: Honorable Clarence C. Newcomer

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 30, 1999
BEFORE: SLOVITER, NYGAARD and
STAPLETON, Circuit Judges
(Opinion filed: October 15,1999)

OPINION OF THE COURT

[*2]STAPLETON, Circuit Judge:

Philip Andre Rennert, along with four other defendants, was convicted of conspiracy, wire fraud, and

securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of multiple public companies to the Teale Network ("Teale"), a fraudulent network of offshore and domestic companies.[1] Teale represented these leased stocks as assets available to pay aims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Co. ("World Life"). When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless.

Rennert has appealed from the jury's verdict and a sentencing adjustment. The government has cross-appealed the sentence imposed by the District Court.

I.

World Life became insolvent at some point in or before 1988. It hid its insolvency from regulators and its insureds, however, by placing a piece of land valued at $60,000 on its books as worth several million dollars. World Life issued the four group medical policies involved in this case in late 1989, in the spring of 1990, in the summer of 1990, and on December 1, 1990. Teale's contracts reinsuring these policies were entered [*3]on November 16, 1989, May 30, 1990, June 28, 1990, November 10, 1990, and November 11, 1990. Pursuant to these agreements, Teale assumed 100% of the liability under the four group medical insurance policies issued by World Life in exchange for 92% of the premiums paid by World Life's insureds on those policies. These

[1] The Teale Network was organized and controlled by Alan Teale. Neither is a party to these proceedings but both are alleged to be unindicted do-conspirators. We will refer to both collectively as "Teale."

reinsurance transactions allowed World Life to reflect a reserve credit of approximately $6 million. Teale received total premiums from World Life of approximately $7 million under its reinsurance contracts. The indictment alleged that the conspiracy among Teale and the defendants existed from about May of 1990 to June of 1992.

In 1990, Philip Rennert created Forum Rothmore, which acted as an intermediary between Teale and publicly traded corporations that desired to lease their stock. Forum Rothmore entered into "surplus contribution agreements," known as RENN contracts, with Teale. The first RENN contract involving one of the defendants was executed on September 1, 1990.

Under the terms of these contracts, corporations leased their stock to Teale and authorized the sale of the stock if necessary to pay claims under insurance policies Teale had reinsured. The value of the stock leased was calculated by multiplying the number of shares by the market price. Teale then listed these shares at the same value on financial statements presented to World Life. In exchange, Teale paid a percentage of monthly leasing fees it received from World Life to Forum Rothmore, which in turn split the fees with the stock providers. Of the approximately $7 million Teale received, [*4]about $3.3 million was distributed to the defendants as rental fees for the leased securities.

The corporations that leased their stock through Forum Rothmore to Teale had few significant assets and little profit making activity. In spite of the corporations' minimal value, over $50 million of stock was leased to Teale. In order to be able to attribute such high values to these stocks, the defendants manipulated the market

quotes and inflated the financial statements of these corporations. Moreover, while certain of the stocks were restricted, they were represented to be marketable and were transferred without any indication of their restricted status. In short, the defendants and Teale falsely held out securities as marketable and valuable, when, in fact, they were unmarketable and virtually without value.

In January 1991, the Pennsylvania Insurance Department began to investigate World Life's financial condition. On July 28, 1991, the Pennsylvania Insurance Commissioner declared World Life insolvent and ordered its liquidation. Since Teale had been paying insurance claims with recently received premiums and had no other significant assets to draw upon, this liquidation deprived Teale of the ability to pay further claims.

The Pennsylvania Life and Health Insurance Guarantee Fund is a state fund authorized by statute to pay outstanding liabilities of licensed Pennsylvania companies that become insolvent. The Guarantee Fund is financed by Pennsylvania insurance [*5] companies. When World Life was liquidated, the Guarantee Fund paid the outstanding group medical reinsurance claims left unpaid as a result of the fraud. The unpaid claims totaled over $6 million.

In February 1996, Rennert was indicted in the Eastern District of Pennsylvania and charged with one count of conspiracy and multiple counts of wire and securities fraud. After a four week trial, the jury, by general verdict, convicted Rennert of conspiracy, five counts of securities fraud, and five counts of wire fraud. At the sentencing hearing, the District Court assigned Rennert an offense level of 13, which included a one-point upward, departure for causing a loss of confidence

in an important institution. The District Court found no monetary loss attributable to Rennert and refused to impose adjustments for jeopardizing the safety of a financial institution. The District court sentenced Rennert to 16 months imprisonment and a $30,000 fine.

II.

Rennert alleges that the evidence presented at trial was insufficient to support his conspiracy, wire fraud, and securities fraud convictions. Rennert asserts that Teale essentially defrauded him by holding himself out as a legitimate business person, supplying him with false financial statements, and lying about the remoteness of the risk companies leasing their stocks through Forum Rothmore were insuring. Rennert also emphasizes that he had no involvement with AFS, Omega, or U.S. Card except as an intermediary, and that while involved with IBAL and Ecotech, he had no knowledge that [*6] their stocks were falsely inflated and not free-trading.

When reviewing the sufficiency of the evidence, we view the evidence in light most favorable to the government and ask whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998) (internal citations omitted). Based on our review of the evidence, we conclude that there was substantial evidence introduced at trial to establish Rennert's willful participation in a conspiracy to commit wire fraud and securities fraud and his commission of the substantive offenses of wire fraud and securities fraud.

The record reflects that Rennert knew that the stocks leased through Forum Rothmore were virtually worthless, although the companies' financial records and the over-the-counter quotes indicated they had substan-

tial value. Rennert participated in "wash" sales and placed "stop-transfer" claims on various stocks in; order maintain the inflated prices. Rennert knew that his business associates were engaging in similar sales price-maintenance purposes. Forum Rothmore's brochure indicated that the company conducted due diligence on the various public companies with whom it dealt, when it in fact did not. Rennert was instrumental in having the restrictive legends removed from stock when he knew the stock did not qualify as free-trading. In the stock leasing contracts, Rennert represented the stocks of the five companies as free-trading and worth lions. There is evidence in the record to support a finding that Rennert knew the [*7]fraudulent scheme involved United States companies rather than solely foreign ventures. Accordingly, we will affirm Rennert's conviction on all counts.[2]

III.

In combination, the parties raise three sentencing issues. The government challenges the District Court's application of the Sentencing Guidelines in two respects: (1) finding no loss under U.S.S.G. §2F1.1; and (2) failing to apply a four-level increase under U.S.S.G. §2F1.1-(b)(6) for a substantial effect on a financial institution. Rennert challenges the District Court's upward departure based on its finding that Rennert's fraudulent acts resulted in loss of confidence in an important institution.

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[2] Additionally, Rennert raised a challenge to the District Court's restricted stock instructions and joined in the instruction challenges raised by his co-defendants. Our reasons for dismissing those challenges are discussed in United States v. Yeaman, Civil Action [sic] Nos. 98-1102, 98-1146 issued DATE. [sic]

The standard of review of a district court's interpretation and application of Sentencing Guidelines is plenary. See United States v. Hallman, 23 F.3d 821, 823 (3d 1994). Findings of facts are measured by the clearly erroneous test. See United States Hillstrom, 958 F.2d 448, 450 (3d Cir. 1993). This Court's review of a district court's decision to upwardly depart is plenary as to whether the increase was permissible and abuse of discretion as to whether the degree of the increase was reasonable. See United States v. Kikumura, 918 F.2d 1084, 1098, 1110 (3d Cir. 1990).

For the reasons provided in United States v. Yeaman, Civil Action [sic] Nos. 98-[*8]1102, 98-1146, filed separately today, we will affirm the District Court's imposition of a point upward departure based on loss of confidence in an important institution and remand for application of U.S.S.G. §§2F1.1 and 2F1.1(b)(6).

TO THE CLERK:

Please file the foregoing Unreported-Not Precedential Opinion.

/s/ Walter K. Stapleton
Circuit Judge

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 98-1103 and 98-1147

UNITED STATES OF AMERICA
Appellant in No. 98-1147

V.

MICHAEL LEWIS MILLER
Appellant in No. 98-1103

On Appeal From The United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 96-cr-00051-4)
District Judge: Honorable Clarence C. Newcomer

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 30, 1999
BEFORE: SLOVITER, NYGAARD and
STAPLETON, Circuit Judges
(Opinion filed: October 15,1999)

OPINION OF THE COURT

[*2]STAPLETON, Circuit Judge:

Michael Lewis Miller, along with four other defendants, was convicted of conspiracy, wire fraud, and securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of multiple public companies to the Teale Network ("Teale"), a fraudulent network of

offshore and domestic companies.[1] Teale represented these leased stocks as assets available to pay aims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Co. ("World Life"). When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless.

Miller has appealed from the jury's verdict and a sentencing adjustment. The government has cross-appealed the sentence imposed by the District Court.

I.

World Life became insolvent at some point in or before 1988. It hid its insolvency from regulators and its insureds, however, by placing a piece of land valued at $60,000 on its books as worth several million dollars. World Life issued the four group medical policies involved in this case in late 1989, in the spring of 1990, in the summer of 1990, and on December 1, 1990. Teale's contracts reinsuring these policies were entered [*3]on November 16, 1989, May 30, 1990, June 28, 1990, November 10, 1990, and November 11, 1990. Pursuant to these agreements, Teale assumed 100% of the liability under the four group medical insurance policies issued by World Life in exchange for 92% of the premiums paid by World Life's insureds on those policies. These reinsurance transactions allowed World Life to reflect a reserve credit of approximately $6 million. Teale received total premiums from World Life of approximately $7 million under its reinsurance contracts. The indictment alleged

[1] The Teale Network was organized and controlled by Alan Teale. Neither is a party to these proceedings but both are alleged to be unindicted co-conspirators. We will refer to both collectively as "Teale."

that the conspiracy among Teale and the defendants existed from about May of 1990 to June of 1992.

In 1990, Philip Rennert created Forum Rothmore, which acted as an intermediary between Teale and publicly traded corporations that desired to lease their stock. Forum Rothmore entered into "surplus contribution agreements," known as RENN contracts, with Teale. The first RENN contract involving one of the defendants was executed on September 1, 1990.

Under the terms of these contracts, corporations leased their stock to Teale and authorized the sale of the stock if necessary to pay claims under insurance policies Teale had reinsured. The value of the stock leased was calculated by multiplying the number of shares by the market price. Teale then listed these shares at the same value on financial statements presented to World Life. In exchange, Teale paid a percentage of monthly leasing fees it received from World Life to Forum Rothmore, which in turn split the fees with the stock providers. Of the approximately $7 million Teale received, [*4]about $3.3 million was distributed to the defendants as rental fees for the leased securities.

The corporations that leased their stock through Forum Rothmore to Teale had few significant assets and little profit making activity. In spite of the corporations' minimal value, over $50 million of stock was leased to Teale. In order to be able to attribute such high values to these stocks, the defendants manipulated the market quotes and inflated the financial statements of these corporations. Moreover, while certain of the stocks were restricted, they were represented to be marketable and were transferred without any indication of their restricted status. In short, the defendants and Teale falsely held

out securities as marketable and valuable, when, in fact, they were unmarketable and virtually without value.

In addition to providing legal service to Forum Rothmore, Miller was a shareholder of Ecotech Corporation (Ecotech), one of the publicly-traded corporations whose stock was leased to Teale.

In January 1991, the Pennsylvania Insurance Department began to investigate World Life's financial condition. On July 28, 1991, the Pennsylvania Insurance Commissioner declared World Life insolvent and ordered its liquidation. Since Teale had been paying insurance claims with recently received premiums and had no other significant assets to draw upon, this liquidation deprived Teale of the ability to pay further claims.

[*5] The Pennsylvania Life and Health Insurance Guarantee Fund is a state fund authorized by statute to pay outstanding liabilities of licensed Pennsylvania companies that become insolvent. The Guarantee Fund is financed by Pennsylvania insurance companies. When World Life was liquidated, the Guarantee Fund paid the outstanding group medical reinsurance claims left unpaid as a result of the fraud. The unpaid claims totaled over $6 million.

In February 1996, Miller was indicted in the Eastern District of Pennsylvania and charged with one count of conspiracy and one count of securities fraud, and multiple counts of wire fraud. After a four week trial, the jury, by general verdict, convicted Miller of conspiracy, securities fraud, and five counts of wire fraud. At the sentencing hearing, the District Court assigned Miller an offense level of 9, which included a one-point upward, departure for causing a loss of confidence in an important institution. The District Court found no

monetary loss attributable to Miller and refused to impose adjustments for jeopardizing the safety of a financial institution. The District court sentenced Miller to 7 months imprisonment and a $10,000 fine.

II.

Miller alleges that the evidence presented at trial was insufficient to support his conspiracy, wire fraud, and securities fraud convictions. Miller asserts that he was never aware that he was involved with the leasing of worthless stocks to World Life; that [*6] the value of these stocks had been manipulated; or that the stocks were restricted but represented as free-trading. Instead, Miller contends that his role was limited to that of an attorney representing his client without knowledge that the client's activities were criminal.

When reviewing the sufficiency of the evidence, we view the evidence in light most favorable to the government and ask whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998) (internal citations omitted). Based on our review of the evidence, we conclude that there was substantial evidence introduced at trial to establish Miller's willful participation in a conspiracy to commit wire fraud and securities fraud and his commission of the substantive offenses of wire fraud and securities fraud.

The record reflects that Miller's involvement extended beyond the role of representation. Miller owned a substantial portion of Ecotech stock and thus was to, and did receive, a portion of the insurance premiums paid out under the terms of the reinsurance contracts. Miller was also involved in attempts to have the restrictive legends of various stocks removed and to

maintain the inflated values of the worthless stocks. These activities cannot be categorized as simple legal advice given upon reliance parties' statements of fact. Accordingly, we will affirm Miller's conviction on [*7]all counts.[2]

III.

In combination, the parties raise four sentencing issues. The government challenges the District Court's application of the Sentencing Guidelines in three respects: (1) finding no loss under U.S.S.G. §2F1.1; (2) failing to apply a four-level increase under U.S.S.G. §2F1.1(b)(6) for a substantial effect on a financial institution; and (3) failing to apply a special skills enhancement under U.S.S.G. §3B1.3. Miller challenges the District upward departure based on its finding that Miller's fraudulent acts resulted in loss of confidence in an important institution.

The standard of review of a district court's interpretation and application of Sentencing Guidelines is plenary. See United States v. Hallman, 23 F.3d 821, 823 (3d Cir. 1994). Findings of facts are measured by the clearly erroneous test. See United States Hillstrom, 958 F.2d 448, 450 (3d Cir. 1993). This Court's review of a district court's decision to upwardly depart is plenary as to whether the increase was permissible and abuse of discretion as to whether the degree of the increase was reasonable. See United States v. Kikumura, 918 F.2d 1084, 1098, 1110 (3d Cir. 1990).

[2]Additionally, Miller joined in the challenges to the jury instructions raised by his co-defendants. Our reasons for dismissing those challenges are discussed in United States v. Yeaman, Civil Action [sic] Nos. 98-1102, 98-1146 issued DATE [sic].

For the reasons provided in United States v. Yeaman, Civil Action [sic] Nos. 98-1102, 98-1146, filed separately today, we will affirm the District Court's imposition of a [*8]one-point upward departure based on loss of confidence in an important institution and remand for application of U.S.S.G. §§2F1.1 and 2F1.1-(b)(6). Additionally, we conclude that the District Court erred in refusing to increase Miller's offense level by 2 points pursuant to Section 3B1.1. The evidence would support a finding that Miller used his legal skills to facilitate significantly the commission of his crimes. Because the applicable Sentencing Guidelines do not already take this skill into account, this adjustment may be appropriate. On remand, the District Court should make a factual finding as to whether Miller's special skills as a lawyer were utilized to facilitate the crimes of which he was convicted.

TO THE CLERK:

Please file the foregoing Unreported-Not Precedential Opinion.

/s/ Walter K. Stapleton
Circuit Judge

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 98-1104 and 98-1148

UNITED STATES OF AMERICA
Appellant in No. 98-1148

V.

GEORGE RAYMOND JENSEN
Appellant in No. 98-1104

On Appeal From The United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 96-cr-00051-5)
District Judge: Honorable Clarence C. Newcomer

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 30, 1999
BEFORE: SLOVITER, NYGAARD and
STAPLETON, Circuit Judges
(Opinion filed: October 15, 1999)

OPINION OF THE COURT

[*2]STAPLETON, Circuit Judge:

George Raymond Jensen, along with four other defendants, was convicted of conspiracy, wire fraud, and securities fraud. His conviction resulted from his involvement in a complex scheme involving the leasing of worthless stocks of multiple public companies to the Teale Network ("Teale"), a fraudulent network of

offshore and domestic companies.[1] Teale represented these leased stocks as assets available to pay aims pursuant to reinsurance contracts entered into with a Pennsylvania-based insurance company, World Life and Health Insurance Co. ("World Life"). When these assets were called upon to pay outstanding medical reinsurance claims, the stocks were deemed worthless.

Jensen has appealed from the jury's verdict and a sentencing adjustment. The government has cross-appealed the sentence imposed by the District Court.

I.

World Life became insolvent at some point in or before 1988. It hid its insolvency from regulators and its insureds, however, by placing a piece of land valued at $60,000 on its books as worth several million dollars. World Life issued the four group medical policies involved in this case in late 1989, in the spring of 1990, in the summer of [*3] 1990, and on December 1, 1990. Teale's contracts reinsuring these policies were entered on November 16, 1989, May 30, 1990, June 28, 1990, November 10, 1990, and November 11, 1990. Pursuant to these agreements, Teale assumed 100% of the liability under the four group medical insurance policies issued by World Life in exchange for 92% of the premiums paid by World Life's insureds on those policies. These reinsurance transactions allowed World Life to reflect a reserve credit of approximately $6 million. Teale received total premiums from World Life of approximately $7 million under its reinsurance contracts. The indictment alleged

[1] The Teale Network was organized and controlled by Alan Teale. Neither is a party to these proceedings but both are alleged to be unindicted co-conspirators. We will refer to both collectively as "Teale."

that the conspiracy among Teale and the defendants existed from about May of 1990 to June of 1992.

In 1990, Philip Rennert created Forum Rothmore, which acted as an intermediary between Teale and publicly traded corporations that desired to lease their stock. Forum Rothmore entered into "surplus contribution agreements," known as RENN contracts, with Teale. The first RENN contract involving one of the defendants was executed on September 1, 1990. Jensen was involved in a series of RENN contracts Between October 15, 1990, and May 10, 1991.

Under the terms of these contracts, corporations leased their stock to Teale and authorized the sale of the stock if necessary to pay claims under insurance policies Teale had reinsured. The value of the stock leased was calculated by multiplying the number of shares by the market price. Teale then listed these shares at the same value on financial statements presented to World Life. In exchange, Teale paid a percentage of [*4]monthly leasing fees it received from World Life to Forum Rothmore, which in turn split the fees with the stock providers. Of the approximately $7 million Teale received, about $3.3 million was distributed to the defendants as rental fees for the leased securities.

Jensen was at various times the control person and president of Ecotech. Ecotech had few significant assets and little profit making activity. In spite of the corporations minimal value, Jensen purported to lease $32 million of Ecotech stock. In order to be able to attribute such high values to these stocks, Jensen manipulated the quotes and inflated the financial statements of these corporations. Moreover, while certain of these stocks were restricted, they were represented to be marketable

and were transferred without any indication of their restricted status. Forum Rothmore assisted Jensen in leasing these falsely-valued and restricted stocks. In short, the defendants and Teale falsely held out securities as marketable and valuable, when, in fact, they were unmarketable and virtually without value.

In January 1991, the Pennsylvania Insurance Department began to investigate World Life's financial condition. On July 28, 1991, the Pennsylvania Insurance Commissioner declared World Life insolvent and ordered its liquidation. Since Teale had been paying insurance claims with recently received premiums and had no other significant assets to draw upon, this liquidation deprived Teale of the ability to pay further claims.

[*5] The Pennsylvania Life and Health Insurance Guarantee Fund is a state fund authorized by statute to pay outstanding liabilities of licensed Pennsylvania companies that become insolvent. The Guarantee Fund is financed by Pennsylvania insurance companies. When World Life was liquidated, the Guarantee Fund paid the outstanding group medical reinsurance claims left unpaid as a result of the fraud. The unpaid claims totaled over $6 million.

In February 1996, Jensen was indicted in the Eastern District of Pennsylvania and charged with one count of conspiracy and one count of securities fraud, and multiple counts of wire fraud. After a four week trial, the jury, by general verdict, convicted Jensen of one count of securities fraud. At the sentencing hearing, the District Court assigned Miller an offense level of 9, which included a one-point upward, departure for causing a loss of confidence in an important institution. The District Court found no monetary loss attributable to Miller and

refused to impose adjustments for jeopardizing the safety of a financial institution. The District court sentenced Miller to 7 months imprisonment and a $10,000 fine.

II.

Jensen alleges that the evidence presented at trial was insufficient to support cities fraud conviction although he does not specify why he believes the evidence establish his guilt. When reviewing the sufficiency of the evidence, we view the evidence in light most favorable to the government and ask whether a "rational trier of [*6] fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998) (internal citations omitted). Based on our review of the evidence, we conclude that there was substantial evidence introduced at trial to establish Jensen's willful participation in a conspiracy to commit wire fraud and securities fraud and his commission of the substantive offenses of wire fraud and securities fraud.

Although Ecotech had no assets and no operations, Jensen represented that each share of stock was worth $6-7, and engaged in market manipulation to maintain this price. In order to remove the restrictive legend from certain Ecotech stock, Jensen lied to the transfer agent about his affiliate status with Ecotech and the length of his possession the relevant stock. These stocks were subsequently leased to World Life.

Accordingly, we will affirm Miller's conviction on the count of securities fraud.[2]

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[2] Additionally, Miller joined in the challenges to the jury instructions raised by his co-defendants. Our reasons for dismissing those challenges are discussed in United States v. Yeaman, Civil Action [sic] Nos. 98-1102, 98-1146 issued DATE. [sic]

III.

In combination, the parties raise four sentencing issues. The government challenges the District Court's application of the Sentencing Guidelines in three respects: (1) finding no loss under U.S.S.G. §2F1.1; (2) failing to apply a four-level increase under U.S.S.G. §2F1.1(b)(6) for a substantial effect on a financial institution; and (3) failing to [*7]apply a special skills enhancement under U.S.S.G. §3B1.3. Jensen challenges the District upward departure based on its finding that Jensen's fraudulent acts resulted in loss of confidence in an important institution.

The standard of review of a district court's interpretation and application of Sentencing Guidelines is plenary. See United States v. Hallman, 23 F.3d 821, 823 (3d Cir. 1994). Findings of facts are measured by the clearly erroneous test. See United States Hillstrom, 958 F.2d 448, 450 (3d Cir. 1993). This Court's review of a district court's decision to upwardly depart is plenary as to whether the increase was permissible and abuse of discretion as to whether the degree of the increase was reasonable. See United States v. Kikumura, 918 F.2d 1084, 1098, 1110 (3d Cir. 1990).

For the reasons provided in United States v. Yeaman, Civil Action [sic] Nos. 98-1102, 98-1146, filed separately today, we will affirm the District Court's imposition of a point upward departure based on loss of confidence in an important institution and remand for application of U.S.S.G. §§2F1.1 and 2F1.1(b)(6), and 3B1.1 consistent with that opinion.

TO THE CLERK:

Please file the foregoing Unreported-Not Precedential Opinion.

/s/ Walter K. Stapleton
Circuit Judge

APPENDIX C

Fed. Sec. L. Rep. ¶ 99,536
(Cite as: 1997 WL 597854 (E.D.Pa.))
Not Reported in F.Supp.

UNITED STATES OF AMERICA
v.
Philip Andre RENNERT, et al.

Crim. Action No. 96-51.
United States District Court, E.D. Pennsylvania.
Sept. 17, 1997.

Marc Durant, Durant & Durant, Phila, PA, Joel Harvey Slomsky Phila, PA, for Philip Andre Rennert, defendant.

Nancy E. Stuart, Hoyle, Morris & Kerr, Phila, PA, John T. Kotelly, Dickstein, Shapiro & Morin, Washington, DC, Frank C. Razzano, Dickstein, Shapiro & Morin, L.L.P., Washington, DC, for David Rex Yeaman, defendant.

Marc Durant, Durant & Durant, Phila, PA, L. Felipe Restrepo, Krasner and Restrepo, Philadelphia, PA, for Michael Lewis Miller, defendant.

Stephen Robert La Cheen, La Cheen, Stephen Robert and Associates, Phila, PA, for George Raymond Jensen, defendant.

Patrick J. Egan, Phila, PA, for Nolan Leigh Mendenhall, defendant.

MEMORANDUM

NEWCOMER, J.

*1 Presently before this Court are Philip Rennert's Motion for a Judgment of Acquittal and/or New Trial, David Yeaman's Motion for Judgment of Acquittal and for a New Trial, Michael Miller's Motion for a Judgment of Acquittal and for a New Trial, George Jensen's Motion for Judgment of Acquittal and for a New Trial, and Nolen Mendenhall's Motion for Judgment of Acquittal and a New Trial, and the government's response thereto. For the following reasons, the Court will deny the defendants' motions.

I. Introduction

On February 7, 1996, an indictment was filed charging the defendants in 18 counts, including conspiracy (one count), wire fraud (seven counts) and securities fraud (ten counts). On December 26, 1996, a stipulation and order was entered in which the government agreed to voluntarily dismiss five counts against defendants.

Count One charged defendants Philip Rennert, David Yeaman, Michael Miller, George Jensen and Nolen Mendenhall with conspiracy to engage in wire fraud and securities fraud in violation of 18 U.S.C. § 371. Counts Two through Eight charged defendants Rennert, Yeaman, Miller, Jensen and Mendenhall with wire fraud in violation of 18 U.S.C. § 1343 and aiding and abetting in violation of 18 U.S.C. § 2.

Count Nine charged defendants Rennert and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U .S.C §§ 77q(a) and 77x. Count Eleven charged defendants Rennert, Miller, Jensen and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x.

Count Thirteen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x. Count Fifteen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x. Count Seventeen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U .S.C. §§ 77q(a) and 77x.

The indictment alleged that the conspiracy charged in Count One began in or about May 1990 and continued until in or about June 1992. The indictment charged the defendants with defrauding an insurance company (World Life and Health Insurance Company), its policyholders and the Guarantee Fund of the Commonwealth of Pennsylvania. According to the indictment, the defendants engaged in fraudulent schemes to provide virtually worthless stocks to reinsurance companies that permitted World Life and Health Insurance Company ("World Life") to sell group medical insurance plans.

The defendants allegedly entered into stock leasing agreements with a group of reinsurance companies controlled by unindicted co-conspirators for the purpose of earning fees derived from the sale of group medical insurance plans. Through various means alleged in the indictment, the defendants created the false appearance that the stocks had substantial value. The reinsurance companies used the stocks to enter into reinsurance contracts with World Life, which, in turn, allowed World Life to sell the group plans. In 1991, World Life failed and was liquidated by the Commonwealth of Pennsylvania. At the time of the liquidation, according to the indictment, there were approximately $5.3 Million in

unpaid claims by the individual policyholders in the group plans. The unpaid claims were covered by a fund created by the Pennsylvania Life and Health Insurance Guarantee Association, known as the Guarantee Fund.

*2 After a five and one-half week trial, the following defendants were convicted by a jury of various charges alleged in the instant indictment, as follows:

1) Philip Rennert: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Counts 9, 11, 13, 15, 17 (Securities Fraud);

2) David Yeaman: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Counts 13, 15, 17 (Securities Fraud);

3) Michael Miller: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Count 13 (Securities Fraud);

4) George Jensen: Count 13 (Securities Fraud); and

5) Nolen Mendenhall: Counts 9, 13, 15 (Securities Fraud).

The jury acquitted all the defendants of Counts 5 and 6 (Wire Fraud) and acquitted Mendenhall of Count 17 (Securities Fraud). The jury was unable to reach a verdict as to Jensen and Mendenhall as to Count 1 (Conspiracy) and Counts 2-4, 7-8 (Wire Fraud). A mistrial was declared as to those counts by the Court.

The defendants have filed motions under Federal Rules of Criminal Procedure 29 and 33, which allege a wide range of complaints, aiming principally at an alleged lack of proof by the government, alleged errors in the Court's instructions to the jury and in the Court's ruling on evidence proffered by the defendants. In their motions, the defendants make some arguments which only address a complaint of a particular defendant, and

they make other arguments which address complaints that apply to all of the defendants. In addition, all of the defendants join in any argument of another defendant which may relate to them. The government has filed a single response, addressing each and every one of the defendants' arguments. The government, in general, argues that the defendants' contentions are without merit and that their post verdict motions should be denied. The Court will address these arguments seriatim.

II. Rule 29 Motions for Judgment of Acquittal

A. Rule 29 Standard

The district court shall order entry of judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses. Fed.R.Crim.P. 29(a). The standard to be applied by a trial court in deciding a motion for judgment of acquittal in a criminal case is "whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); United States v. Coleman, 862 F.2d 455, 460-61 (3d Cir.1988).

The verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support the verdict. United States v. Aguilar, 843 F.2d 155, 157 (3d Cir.1988). Thus, the evidence in the record must be examined as a whole and in the light most favorable to the government. See United States v. Lowell, 649 F.2d 950, 958 (3d Cir.1981). The government must be given the benefit of inferences that may be drawn from the evidence and the evidence may be considered probative even if it is circumstantial. See

United States v. Pecora, 798 F.2d 614, 618 (3d Cir.1986). The verdict will be overruled only if no reasonable fact finder could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. United States v. Leo, 941 F.2d 181 (3d Cir.1991).

B. Variance

***3** A variance results when the charging language of the indictment remains unaltered, but the evidence at trial proves facts other than those alleged in the indictment. See United States v. Castro, 776 F.2d 1118, 1121 (3d Cir.1985) (citation omitted). The principal issue underlying the concern over variance is whether the defendant has been fully advised by the indictment of the actions giving rise to the charges against him so that the constitutional requirements of fair notice and double jeopardy concerns are met. See id. at 1122. However, even "a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." United States v. Smith, 789 F.2d 196, 200 (3d Cir.1986). Because a variance is less severe an infringement of a defendant's rights to be tried only on the charges returned by a grand jury than, for example, a constructive amendment, courts will rarely reverse a conviction based on variance unless the defendant can show substantial prejudice. Castro, 776 F.2d at 1121-22 (variances constitute reversible error in those cases where the variance prejudice the defendant's defense). Moreover, variances relating to non-material elements are neither prejudicial nor fatal to a conviction. See, e.g., United States v. Massey, 827 F.2d 995, 1004 (5th Cir.1987) (no fatal variance between indictment

charging conspiracy to defraud subsidiary company and proof at trial of fraud on parent company where defendants were fully advised by indictment of actions giving rise to the charge).

In some cases, allegations in the indictment "unnecessary to and independent from allegations of the offense proved may normally be treated as a 'useless averment' that 'may be ignored.'" United States v. Miller, 471 U.S. 130, 136, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1585). Thus, where the indictment averred events occurring in Texas and Florida, but the remaining averments in the indictment and the proof at trial was clearly sufficient to support a jury finding of conspiracy to purchase drugs in Pennsylvania, the alleged variance was not fatal. The court reasoned that the indictment clearly set forth the "theories" by which the defendants violated the statute, and the evidence at trial conformed to the "theory of a conspiracy" to purchase drugs as set out in the indictment. Accordingly, the court deemed the offenses occurring in Texas and Florida to be properly characterized as "unnecessary" to the conspiracy proved at trial and, as such, defendants were not prejudiced.

In this case, the government claims that its proof of "theory of conspiracy" at trial conformed to the "theory" articulated in the indictment. The government contends that the allegations that the named victims were defrauded by the defendants was sufficiently proved at trial. The government further asserts that the indictment clearly set forth the theories by which the defendants violated the statutes charged and that the evidence at trial conformed to the theory of conspiracy as set out in the indictment.

*4 The government argues that, as in Castro, the indictment and proof at trial satisfied the underlying constitutional concerns: (1) there was no prejudicial surprise at trial by the proof offered concerning the defendants' knowledge of the use of stocks which worked to defraud World Life and its policyholders and (2) the indictment and conviction are sufficient to allow these defendants to plead it as a bar under double jeopardy to any future prosecutions.

C. Evidence of Conspiracy

In this case all of the defendants join in various arguments suggesting that acquittals should be entered because the government's proof at trial created a prejudicial variance from the indictment, under the defendants' theory that there was insufficient evidence to prove that any of the defendants specifically agreed to defraud the victims named in the indictment, namely, World Life, its policyholders and the Guarantee Fund.[1] The government contends that the defendants' arguments are without merit because: (1) the government's evidence at trial adequately supports a finding that defendants Rennert, Miller and Yeaman, who were convicted of conspiracy, did know the specific identity of the named victims and (2) even if the evidence did not support such a finding of specific knowledge, knowledge by the conspirators of the specific victim is irrelevant and unnecessary to the government's burden of proof of the

[1] Because Jensen and Mendenhall raise these similar variance issues in the context of the substantive securities fraud counts for which they were convicted, the issue of whether there exists sufficient evidence to support their substantive securities fraud convictions will be discussed *infra*.

existence of the conspiracy charged and a conspirator's participation in it.

1. Elements of Conspiracy

The elements needed to prove a conspiracy have been variously stated, but generally reduced to three elements: "The three elements of Section 371 Conspiracy are (1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objective, and (3) an intent on the part of the conspirators to agree as well as to defraud the United States." United States v. Rankin, 870 F.2d 109, 113 (3d Cir.1989). "The essence of criminal conspiracy ... is an agreement, either explicit or implicit, to commit an unlawful act, combined with intent to commit an unlawful act, combined with intent to commit the underlying offense." United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir.1986).

In United States v. Rosenblatt, 554 F.2d 36 (2d Cir.1977), the Court held that the law of conspiracy requires agreement as to the object of the conspiracy. This does not mean that co-conspirators must be shown to have agreed on the details of the criminal enterprise, but only that the essential nature of the plan was shown. For example, in United States v. Rapp, 871 F.2d 957, 964-65 (11th Cir.1989), defendants knew of the fraudulent multi- million dollar loan transaction, but the evidence did not show the defendant knew of the stock purchase aspect of the conspiracy. Nevertheless, the defendants conviction for conspiracy was upheld, the court holding that defendants were guilty of conspiracy when they had knowledge of two of the conspiracy's primary objectives, even though they did not know the exact scope of the conspiracy.

*5 Once sufficient evidence of a conspiracy is established, only slight evidence of the defendant's connection to it is required. United States v. Kates, 508 F.2d 308, 310 n. 4 (3d Cir.1975); United States v. Gironda, 758 F.2d 1201, 1271 (7th Cir.1985).

The question posited at this time is whether the government produced substantial evidence at trial to support each and every element of the conspiracy so that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. As will be discussed below, the Court finds that the government produced substantial evidence at trial upon which the jury verdicts for conspiracy can rest.

2. Indictment and Proof at Trial

The indictment alleged that the objects of the conspiracy were wire fraud and securities fraud. (Indictment ¶ 4 a-c). These specified objects were alleged to have victimized World Life, its policyholders and the Guarantee Fund. The indictment also alleged that the purpose of the conspiracy was "financial enrichment", (Indictment ¶ 5), accomplished by two means: first, "by providing, and causing to be provided, virtually worthless stock for use as collateral and as corporate assets purportedly available under reinsurance contracts with World Re[2] ..." and, second, "by falsely representing the said stock as being marketable and valuable, to defraud

[2] World Re, Inc. ("World Re") was a Delaware corporation based in Atlanta, Georgia, and was part of the Teale Network. From in or about November 1989 to in or about June 1991, World Re managed reinsurance contracts on behalf of the Teale Network reinsurance companies, which were held out as providing reinsurance of group medical insurance policies issued by World Life.

World Life, its policyholders and the Guarantee Fund." (Indictment ¶ 5).

A review of the evidence of record in this case establishes that Rennert, Mendenhall, and Miller, through Forum Rothmore ("Forum") and on behalf of themselves, Yeaman, Jensen and Jeffrey Hays,[3] entered into numerous agreements to lease stock as assets to the insurance companies connected with Alan Teale.[4] Both the Forum brochure and a recorded conversation with Mendenhall evidenced that Forum's role included examination of a lessee insurance company's business to provide a basis for the recommendation to a stock

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[3] Jeffrey Hays is an indicted co-conspirator who plead guilty prior to trial and testified on behalf of the government against the other defendants.

[4] The indictment alleged that Alan Teale, as well as Charlotte Rentz, who were indicted elsewhere, owned and controlled a network of foreign and domestic shell companies ("the Teale Network"). The indictment alleged that these companies were falsely held out by Teale, Rentz and others as being well-capitalized reinsurance companies domiciled offshore and domestic service companies which managed the business of the offshore reinsurance companies.

The indictment alleged that the defendants entered into a complex and sophisticated conspiracy to commit wire fraud and securities by providing worthless stock to Teale to enable Teale to use the worthless stock as assets on the balance sheets of the offshore companies controlled by the Teale Network. The offshore insurance companies, in turn, obtained reinsurance contracts with U.S. insurance companies, including World Life, based on fraudulent representations, which allegedly originated with the defendants, about the value and marketability of the stock assets.

provided that the lessee's company was a good match for the stock.

Among other manner and means charged, these so-called "assets" were made available through the fraudulent activities of Rennert, Yeaman, Miller, Jensen, Mendenhall and Hays, which included creating shares, rigging and supporting artificial, highly inflated prices for the leased stock in the over-the-counter market, in order to give a high market value to the stock provided under the Forum contracts with the Teale Network. Much of the evidence produced in the four weeks of testimony at trial was directed to and substantially supported this allegation and theory of conspiracy. The purpose of this artifice was self-evident: the higher the artificial market price, the more the defendants could obtain in leasing fees from Teale and, accordingly, the more insurance policies the Teale companies could write to obtain its policyholders premiums.

The Forum brochure (Ex. 55), as well as the numerous surplus contributions agreements ("RENN contracts") (see generally Ex. 43), clearly support a finding of knowledge by the participants--Rennert, Yeaman, Miller, Jensen and Mendenhall--of the intended purposes for which these inflated stocks were to be used once they were leased by the Teale insurance companies. The evidence would support a finding that the defendants knew and intended these stocks to be used on financial statements and in collateral accounts to support policyholders' claims for any business written by the lessee insurance companies.

***6** The evidence also supports a finding that Rennert and Mendenhall directly provided valuations of these stocks to auditors for the Teale Network insurance

companies which reinsured World Life. (Exs. 43-128 Letters to Prof. Missorten of 2/25/91 and 6/4/91). Even if this fact alone does not establish direct knowledge of the specific identity of World Life as an ultimate victim, it should have been a readily foreseeable result to the defendants that the false and misleading information that they provided would be further disseminated by mail or wire by the Teale Network co-conspirators to ultimate victims. See United States v. Schurr, 794 F.2d 903, 909 n. 8 (3d Cir.1986) (conspirators liable for conspiracy to accomplish whatever foreseeable crimes their co-conspirators commit in the course of accomplishing the main objective of the conspiracy).

The evidence at trial would also support a finding that the defendants intended, and, in fact, did financially enrich themselves by these fraudulent means, up to $3.3 million. Both the brochure of Somerset Marketing (Rennert's predecessor company to Forum) and then of Forum described the mechanism, as well as the dollar amount, of the leasing fee to be earned by asset (stock) providers. (Exs. 47 (9, 15 and 16); Ex. 56 (6, 12 and 13)). Further, the surplus contribution agreements set forth the formula for the dollar amount of the leasing fee as being the number of shares leased times the bid price of the stock in the market. Asset providers received 7% of the formula for bulletin board stocks and 8% for NASDAQ stocks. (Exs. 43-106, 43-124, and 43-133, ¶ 1.0 and the promissory note attached thereto; Ex. 43-106, p. 12). These figures were consistent with the money actually received by the defendants under the RENN contracts.[5]

[5] There is no requirement, however, that the government prove that the scheme succeeded or that the defendants

Wire transfers from World Re for $790,000 and for 503,914 were admitted into evidence. (Exs.40A, 40B). These exhibits demonstrated the flow of funds from World Life (policyholders' premiums) to World Re and then from World Re to Forum. Internal records of Forum showed the division of monthly and annual fees paid to each of the defendants on a per stock basis under each contract. (Ex. 110). The work papers of Forum's accountant showed which defendant was paid and in what dollar amounts as of December 1991, and a government agent analyzed the payments to each defendant and traced the money as stated above. (Exs. 79-e; testimony of Special Agent William Turpin). This evidence adequately demonstrated Rennert, Yeaman and Miller, the defendants convicted of conspiracy, were paid specifically under contracts for stock earmarked for an escrow account which was established by World Re to support reinsurance business with World Life. One such Renn Contract, RENN 133, specified on its face the name "Worlco" and the designated custodian "Corestates Bank in Philadelphia, Pennsylvania." (Exs. 43-133, 106 Supp.). The evidence offered at trial supports a finding that during the period of the conspiracy, this contract was physically in the possession of each of the defendants convicted of conspiracy. (Ex. 32).

*7 Thus, the Court finds that consistent with the law of conspiracy and the indictment, the government established that: (1) Rennert, Yeaman and Miller, the defendants convicted of conspiracy, intended to carry out the objects of the conspiracy, i.e., violations of wire fraud

_____(cont'd)

actually obtained scheme proceeds. United States v. Curtis, 537 F.2d 1091 (10th Cir.1976).

and securities fraud statutes; (2) these defendants knew that the stocks would be used as assets at market value on the financial statements of an insurance company; (3) specifically, that World Life and its policy holders was a known or at least a foreseeable victim of that fraudulent activity and; (4) the purpose of the conspiracy was as alleged in the indictment, financial enrichment, by providing worthless stock and by falsely representing its value and marketability (Indictment ¶ 5). Consequently, the Court concludes that the evidence, as generally summarized above, well supported the verdict and is sufficient.

Beyond the evidence as summarized above, the government provides a detailed description of evidence which was introduced at trial to convict each of the three defendants who were found guilty of conspiracy to commit wire and securities fraud. After reviewing this evidence, the Court finds that there was more than sufficient evidence offered at trial with respect to each of the three defendants who were found guilty of conspiracy to commit wire fraud and securities fraud and that they specifically victimized World Life, its policyholders and the Guarantee Fund.

On pages 18-22 of the government's brief, the government details a substantial amount of evidence that supports the finding that Rennert knew that the stocks provided by Forum had prices that were rigged and artificially maintained, that those stock prices wound up on the financial statements of various insurance companies which engaged in business with World Life on the basis of those inflated assets, and that World life, its policyholders and the Guarantee Fund were victims of that fraud. Thus, the Court rejects Rennert's Rule 29 motion with respect to the conspiracy conviction.

The Court also must reject Yeaman's challenge to his conspiracy conviction under Rule 29. As thoroughly set forth in the government's brief at pages 22-24, there was ample and sufficient evidence offered at trial to demonstrate that Yeaman knew that the stock leasing scheme with World Re and Teale also specifically involved and implicated World Life and its policyholders as potential victims.

With respect to Miller, the Court also finds that there was sufficient evidence to support his conspiracy conviction. The government, at pages 24-27, details the substantial evidence that was offered at trial against Miller and supports his conspiracy conviction. Much of this evidence dealt with Miller's efforts to contrive a falsely inflated financial statement for the Ecotech Corporation ("Ecotech")[6] to provide Forum with the attorney letters to improperly remove restrictive legends from restricted shares of Ecotech stock, and for insupportable demands on the transfer agent to stop transfer of Ecotech certificates whenever stock was threatened to be sold in the marketplace. The evidence at trial would support a finding that Miller's role in this scheme was to provide Forum and Rennert with an

[6] Ecotech was one of the stock companies that Forum entered into and managed leasing agreements for over-the-counter stocks Teale Network for use on financial statements of Teale Network reinsurance companies doing business with World Life and to fund the World Re escrow accounts for the benefit of World Life. Evidence was offered at trial to support the government's allegation that the stocks issued by Ecotech, as well as other companies, were falsely held out by the defendants to be marketable and valuable, when in fact, the stocks were not marketable and virtually worthless.

attorney's imprimatur and false appearance of legitimacy to the scheme to issue inflated, restricted stock in leasing contracts to the Teale offshore companies. As exhibit 44 charts of the RENN agreements demonstrate, Ecotech was the hallmark stock of Forum, accounting for nearly one-half of the total value of the assets provided to Teale from September 1990 through approximately July 1991, when several contracts switched stocks due to public exposure. This abundant evidence clearly established Miller's connection to the objects of the conspiracy to commit wire fraud and securities fraud. In addition, there is also sufficient evidence to demonstrate Miller's knowledge of the stock leasing arrangements between Rennert and Teale and even the specific identity of World Life, its policyholders and the Guarantee Fund as victims of the conspiracy. Because the evidence abundantly and sufficiently supports the jury's verdict that Miller was guilty of conspiracy, as charged in the indictment, the Court rejects Miller's Rule 29 motion with respect to his conspiracy conviction.

D. No Requirement of Proof that Defendants Knew the Entire Scope of the Conspiracy or the Specific Identity of the Victims

1. Chain Conspiracy

***8** Defendants claim that because they did not directly negotiate the reinsurance contracts with World Life, they are not responsible for defrauding it or for the actions of the Teale Network. For the following reasons, the Court rejects defendants' argument.

By analogy, the Court notes that defendants' argument is the type of argument which has been unsuccessfully advanced by defendants in narcotics cases who contend that their only express intent was to deal with their

immediate associates for the purpose of accomplishing narrow goals, such as to smuggle narcotics, distribute them or retail them to the public. Defendants argue that they were neither participants in nor intended to effect the criminal ends of the larger conspiracy. In general, courts have rejected such an attempt to limit the conspiratorial intent, holding that the defendants knew that "the success of their independent venture was wholly dependent on the success of the entire chain." United States v. Agueci, 310 F.2d 817, 826-27 (2d Cir.1962). The Agueci court reasoned that:

> An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the government in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level.

Id. at 827.

This reasoning has been applied in cases of market manipulation. In United States v. Cohen, 518 F.2d 727, 735 (2d Cir.1975), defendant's conviction for conspiracy to commit market manipulation was upheld because he "was participating with his co-defendants in the continuing scheme," even though one group of defendants were pursuing other related fraudulent activities concurrently with their activities to manipulate price of the stock. The court found that even though this defendant did not

participate in every one of the other frauds perpetrated by the other defendants, and even though this defendant may not have known of the specific details of those extra activities, he nonetheless was held responsible for them as well.

The question is whether there was a single conspiracy or multiple conspiracies. In United States v. Padilla, 982 F.2d 110, 114 (3d Cir.1992), the court employed a three-step inquiry to determine if a series of events constitute a single conspiracy: (1) whether the conspirators had a common goal; (2) whether the nature of the scheme was such that the agreement contemplated bringing about a continuous result that would not continue without the continuous cooperation of the conspirators; and (3) to what extent did the participants overlap in various dealings. Evidence is sufficient to link all of the defendants charged with the conspiracy even where not all of the defendants know of the identities of all the other participants in the conspiracy. United States v. De Peri, 778 F.2d 963 (3d Cir.1985). The government need not prove that the defendants ever got together in a single group and agreed to a single, unified plan. United States v. Donsky, 825 F.2d 746, 753 (3d Cir.1987).

***9** The evidence at trial supports a jury finding of a single conspiracy linked together by a common goal and not two separate, independent conspiracies. Success of each link in the chain was dependent on the activities of all the co-conspirators, both those associated with Forum and those associated with the Teale Network. The stocks to be provided through Forum could not be a source of income to these defendants unless Teale was successful in arranging reinsurance treaties with primary insurance companies whose policy holders provided that cash flow

with their premium dollars. The reinsurance arrangements could not be successful unless the stocks provided by the defendants could be held out by Teale as "marketable" and valuable, so that their artificiality inflated market values could be placed on the balance sheets of the reinsurance companies, i.e., the stocks were worthless without the insurance network, and insurance network could not operate without the stocks as assets.

In the cases of chain conspiracy, the element of knowledge of he larger operation may be satisfied by proof of actual knowledge or proof of participation in the transaction from which knowledge of the common design and purpose may be inferred. Agueci, 310 F.2d 817. In this case, the evidence supports a finding that Rennert learned of Teale's scheme through Rennert's leasing of Heartsoft stock through Brooke-Allman, and Rennert quickly desired to be Teale's "right-hand" man. According to Hays, Teale was the only one "who was actually paying money" for his "window dressing" stock. Rentz testified that Rennert was fully informed about how the stock leasing arrangement worked from the first meeting. When Rennert set up Forum, his own brochure spelled out the entire scheme. Rennert was also well aware of the stocks and the market values ascribed to them in each of the surplus agreements--indeed, they were styled "RENN" contracts--and he signed every one of them. Both Rennert and Teale closely monitored and kept each other constantly informed of anything that could jeopardize their scheme, such as public exposure of the stocks. (Exs.16, 22-24, 28-A-B, 29).

Moreover, Rennert and Miller, as well as Mendenhall, were on the Board of Directors of one of Teale's shell companies -- Europe and Transpacific Mercantile

Insurance -- from which these defendants learned firsthand from Teale how stocks could be used to inflate financial statements and obtain a flow of cash from reinsurance premiums without any start-up costs. (Ex. 42-105(2)).

The evidence also supports a jury finding that defendants knew that they would not obtain any money for the otherwise worthless paper they provided to Teale unless the stocks were used in the insurance business to generate an income flow to the Teale Network. Thus, the defendants cannot now point the finger solely at Teale. Based on the ample amount of evidence in this case as to the knowledge and intent of the defendants in their transactions with the Teale Network, the evidence clearly and sufficiently supports the finding that the defendants knew and agreed to the implications of their conduct on the ultimate victims.

2. Specific Identity of the Victims

***10** Defendants argue that in order to be convicted of conspiracy the government must establish that the sole purpose of the conspiracy was specifically and exclusively to defraud World Life, its policyholders and the Guarantee Fund. Because this argument is contrary to the law and the indictment in this case, the Court rejects this argument.

As stated above, it is sufficient to show that the defendants had the specific intent to engage in the objects and purposes of the conspiracy, i.e., to violate the wire fraud and securities fraud statutes for the purpose of financial enrichment. While the government's proof as to how they accomplish these goals may not be so inconsistent with the indictment so as to constitute a prejudicial variance, this requirement does not elevate

the identity of the victim to an element of the offense or prerequisite of proof to establish any defendant's enlistment in the conspiracy. United States v. Wayman, 510 F.2d 1020, 1025 (5th Cir.1975) (citation omitted). Because knowledge of the specific identity of the victim is not required under wire or securities fraud statutes, the defendants could not be substantially prejudiced even in the absence of any proof that they specifically knew the victim's identity.

In United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1974), the Supreme Court held that there is no requirement in a conspiracy case to prove the identity of a specific victim, unless a statute specifically requires it. In Feola, the defendants attacked two men in what they believed to be a narcotics "rip off" of drug buyers. To the defendants' surprise, they were charged with assaulting and conspiring to assault federal officers, because their prey were, in fact, undercover federal narcotics agents. The Supreme Court affirmed the lower courts' finding that in order to find the defendants guilty on either the conspiracy or substantive assault of a federal officer, the jury was not required to find that the defendants were aware of the identity of their victim, even though that fact conferred federal jurisdiction. The Court found that only the scienter required for the substantive offense was required to convict of the conspiracy. In Feola, the scienter required for the substantive assault did not also depend upon whether the assailant was aware of the official identity of his victim at the time he acted. Id. at 692-93.

In the instant case, the evidence established that the defendants, who were convicted of conspiracy, conspired to defraud insurance companies by contributing manipu-

lated stocks to support the insurance policies written. That is all that the government was required to show. It makes no difference whether the defendants knew or specifically intended to defraud the specific insurance company or other victims named in the indictment. Nowhere in the scienter requirements for wire fraud or securities fraud is there an element requiring knowledge of the identity of the victim. Thus, no higher scienter can be applied to the sufficiency of proof of conspiracy.

*11 Accordingly, even if there had been no proof at trial about the extent of the defendants' knowledge and intent to defraud, specifically, World Life, its policyholders or the Guarantee Fund, that would not be fatal to the sufficiency of proof of the indictment.

E. Sufficiency of Evidence of Conspiracy to Commit Wire Fraud

Defendant Yeaman also argues that the government failed to prove that he "did cause" the transmittal of the wires listed in Counts Two through Eight. As such, he claims that there is insufficient evidence to support this conviction. The government claims that this contention is unfounded.

Generally, there is no requirement that the government prove specific intent to use mails (or wires) as an essential element of the scheme because it is jurisdictional, so long as it was foreseeable that mails (or wires) could be used in furtherance of the scheme. United States v. Turley, 891 F.2d 57, 60 (3d Cir.1989). As the court in United States v. Cusino, 694 F.2d 185, 188 (9th Cir.1982) stated, regarding the wire fraud statute: "The specific intent requirement under 18 U.S.C. § 1343 pertains to the scheme to defraud ... not to the causing of wire transmissions." The defendant does not actually have to know that the mails were used:

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

Periera v. United States, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435 (1954). Neither is specific intent to use the wires a necessary element in a wire fraud conspiracy. United States v. Klein, 515 F.2d 751, 753 n. 3a (3d Cir.1975).

In this case, Yeaman may not claim that the transmittal of information by wire of the value and transfer of securities, including U.S. Card Investors, Inc. ("U.S.Card"), Omega Power, Inc. ("Omega") and American Family Services, Inc. ("AFS"),[7] into the escrow account at Corestates was not "reasonably foreseeable" to him, even if he did not direct the correspondence himself. Yeaman caused the transmission of the information as to the value of stocks and their marketability, based on his own fraudulent activities in the secondary market to rig and support artificial inflated prices and his control over the transfer of restricted shares of U.S. Card, Omega and AFS under the guise of unrestricted certificates. The evidence shows that Yeaman himself used the phone and facsimile transmission in this regard.[8]

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[7] These companies were some of the stock companies that Forum entered into and managed leasing agreements for over-the-counter stocks with the Teale Network for use on financial statements of Teale Network reinsurance companies doing business with World Life and to fund the World Re escrow accounts for the benefit of World Life.

[8] This analysis would apply equally to all the defendants who also raise this argument.

F. Sufficiency of Evidence of Conspiracy to Commit Securities Fraud

1. Actual Purchasers

Yeaman, joined by the other defendants,[9] argues that there is no evidence of intent to defraud the Pennsylvania victims as the actual "purchasers" of the securities, this time from the point of view that the government failed to offer evidence that any defendant dealt directly with any of the alleged "purchasers," i.e., World Life, its policyholders or the Guarantee Fund. Therefore, the defendants posit that no conviction can stand under Section 17(a)(3).[10]

***12** In a prosecution for securities fraud, there is simply no requirement that there actually be a purchaser for a conviction to be sustained. Thus, the Court rejects defendants' argument. In United States v. Naftalin, 441 U.S. 768, 773, 99 S.Ct. 2077, 60 L.Ed.2d 624 (1979), the

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[9] Defendant Jensen also raises this same argument in the context of the substantive securities fraud count (Count Eleven) of which he was convicted. The same principles apply in the analysis of the substantive charge of securities fraud under Section 17(a)(3) of the Securities Act of 1933.

[10] Proof under Section 17(a) of the Securities Act requires that the defendant willfully: (1) employed any device, scheme or artifice to defraud; or, (2) obtained money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or, (3) engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser. 15 U.S.C. § 77(q)(a).

defendants contended that the word "purchaser," which is found only in subsection (3), should be read into all three subsections. The Supreme Court rejected this argument:

> The short answer is that Congress did not write the statute that way. Indeed, the fact that it did not provides strong affirmative evidence that while impact upon a purchaser may be relevant to prosecutions brought under [subsection] (3), it is not required for those brought under [subsection] (1).

Id. Referring to the "punctuation" in the statute to support its conclusion, the Supreme Court stated:

> nothing on the face of the statute suggests a congressional intent to limit its coverage to frauds upon purchasers.

Id. at 774 n.5 (quotations and internal citation omitted). Thus, the defendants are simply wrong to argue that they must be proven to have intended to defraud World Life, its policyholders and the Guarantee Fund as actual "purchasers" or directly dealt with these victims in that capacity.

2. Evidence of Misrepresentations by Yeaman

Yeaman claims that the government failed to offer any proof that Yeaman himself made any of the representations about the offer or sale of the three stocks -- U.S. Card, Omega and AFS -- he contributed to the conspiracy. This argument by Yeaman simply ignores the evidence that was produced at trial about the misrepresentations charged and the theory of securities fraud set forth in the indictment. The indictment and proof at trial focused on three principal areas of misrepresentation with respect to Yeaman. After reviewing the evidence of record, the Court finds that there was sufficient evidence to prove that misrepre-

sentations were created and disseminated directly as a result of Yeaman's fraudulent efforts to further the scheme to create inflated assets for the Teale leasing program.

The indictment first alleged that the stocks provided by Yeaman to the RENN contracts were misrepresented as to their market value; specifically, U.S. Card at $1.50 bid -- $2.00 ask; Omega at $3.50 bid -- $4.25 ask; AFS at $1.50 bid -- $2.00 ask. (Indictment ¶ 6(j)). The testimony and documentary evidence that Yeaman was directly responsible for the phony creation of these quotations was substantial. The evidence substantially supports a finding that the information available to the marketplace as to the market value of the stocks was the direct result of Yeaman's activities in rigging the artificial prices of these stocks, making representations to the marketplace through a market maker, and fraudulently supporting the artificial market quote with inflated assets reflected in financial information provided by the issuer. In the interests of time and space, the Court will not specifically set forth all of the evidence which supports a finding that Yeaman made certain misrepresentations, expect to note that the government details this evidence at pages 40-42 of its brief.

*13 The indictment also charged the defendants with misrepresentations that the stocks in the escrow accounts were free trading when, in fact, they were restricted. The evidence at trial supports a finding that the defendants, as the indictment charged, used means to accomplish this part of the scheme, including making false representations to transfer agents and altering a document which was used to support the removal of restrictive legends.

Janice Ragsdale, Yeaman's employee at National Stock Transfer ("NST"), the transfer agent for U.S. Card, Omega and AFS, testified that she, under the supervision of Yeaman, whited-out the caption of Grossack's legal opinion letter so that it could be affixed to transfers of stock from Yeaman's affiliated companies (Capital General and IAFC) either to World Re or to Corestates Bank (Patterson & Co.). David Grossack testified that this application of his legal opinion for an unrelated transaction was done without his authorization or approval.

Ragsdale also testified that the "Regulation S" stamp that was placed on the face of the transfer records for the World Re shares into the name of "Patterson and Company" was done without any knowledge on her part as to the significance of this regulation. She stated that the transfers of stock to the insurance companies' leasing deals were supervised by Yeaman. Only the most routine activities for these transfers were done by her without Yeaman's direction. The parties stipulated that the transfer records of NST for 466,667 shares of U.S. Card, 186,667 shares of Omega and 400,000 shares of AFS, transferred from Yeaman's companies to World Re, then to Corestates, and finally to the Statutory Liquidator were, in fact, "restricted" on the books of each of the stock companies. Yet, none of the stock certificates provided to RENN contract 133 which provided these escrow shares, carried any restrictive legend or other indicia that they could not be sold freely.

The RENN 133 contract, a copy of which Yeaman possessed, clearly set forth the purpose for which this stock was to be used. The contract unequivocally stated that the securities provided under the contract were "not

subject to restriction." (Ex. 43-133, p. 2, ¶ 2.1). Thus, the evidence clearly supports a finding that the securities provided by Yeaman to RENN 133 were falsely represented by him to be free trading, in furtherance of the securities fraud charged in the indictment.

With respect to Ecotech, transfer agent Bruce Rogers testified that he received an affidavit from George Jensen stating that 5 millions shares of Ecotech restricted stock had been held by Jensen for more than three years and that Jensen had not been a control person of Ecotech for more than three months. This affidavit was a necessary prerequisite for the removal of the restrictive legend by Rogers on the new certificates issued from the 5 million shares. Despite this affidavit, evidence at trial supports a finding that Jensen's averments were false.

*14 The records of Ecotech and the records of Trans National Transfer, Ecotech's transfer agent, established that the 5 million share Ecotech certificate, subject to the false affidavit, had been issued to Jensen only 13 months earlier. Moreover, the transfer agent's records and summary chart of Ecotech's control shareholders support a finding that Jensen had been a control person of Ecotech, by virtue of shares controlled by him, during the prior three months. Neither did the movement and creation of Ecotech stock by Jensen, Rennert, Miller and Mendenhall alter Jensen's status as a control person, because the evidence would support a finding that they were all working in concert.

Jensen caused Rogers to reissue the restricted certificate into two certificates without restrictive legends, one of which was issued to Rennert for 2.5 million shares. Then, Rennert created several smaller certificates from the 2.5 million shares, also without restrictive legend,

from which 160,000 shares was provided under RENN 124 to World Re for the escrow account for the benefit of World Life. Jensen and Miller were each paid leasing fees for Ecotech stock under RENN 124, despite the fact that the shares provided to this contract were all in Rennert's name.

Thus, the evidence showed that the allegations in the indictment concerning misrepresentations of restrictions on the shares of stock pledged to the Corestates escrow account for World Life was properly charged. The proof did not vary from the charges in the indictment and it is sufficient to support a verdict.

The indictment also charges Yeaman with having failed to disclose that he previously had been found to have violated securities laws. (Indictment ¶ 6(o)(2)). The Court finds, despite Yeaman's objections to the contrary, that the testimonial and documentary evidence of filings with the Securities and Exchange Commission ("SEC") supports a finding that Yeaman failed to disclose material information of his prior and ongoing securities law violations in 10-Ks filed with the SEC by U.S. Card and Omega. (Testimony of DeLacy; Exs. 94-C(33-44), 99-B (13-23), 133).

Accordingly, the Court finds that Yeaman's argument for acquittal as to misrepresentations charged in the indictment is without merit.

3. The Materiality of Misrepresentations

Yeaman contends that even if he was responsible for the misrepresentations charged in the indictment, they were not material because there was publicly available information that the public issuers were development stage companies and because World Life "rejected the stocks." The Court finds that these arguments are without merit.

To begin, the indictment did not allege material misrepresentations made by the defendants concerned with the state of the issuers of small, development stage companies. Instead, as discussed in the preceding section, the principal misrepresentations alleged in the indictment concerned the market price and value and the marketability of the escrow stocks. The remaining allegations concerned material misrepresentations as to the percentage of stock holdings and control of the issuer by each of the defendants, the value of the primary asset of the issuer, which in the case of each stock was substantially inflated and the failure by Yeaman to disclose prior securities violations.

*15 Moreover, what Yeaman argues to be a clear "rejection" of the stock by World Life was, in fact, merely an assumption which is not supported by the evidence. Defendants' argument with respect to this issue seems to stem from a letter written by Ron Meyer, CEO of Worlco, requesting that World Re replace the escrow stocks with cash or cash equivalents. Defendants seem to argue that this letter proves conclusively that World Life must have had other material public information on which to base Meyer's alleged rejection of the stocks already delivered to the escrow account. Thus, the defendant contends that any misrepresentations and omissions charged in the indictment cannot be deemed material.

This argument, however, first mischaracterizes the standards to be applied at this stage. Indeed, the Court must view the evidence in a light most favorable to the government at this stage, not viewed in a light most favorable to the defendants. The Court also finds that Yeaman's argument is not supported by the facts in this case or the law.

First, the defendants fail to establish why the material information they omitted to disclose becomes immaterial merely because certain indicia of risk associated with these stocks was available to World Life. In addition, the evidence demonstrated that Meyer's request was just that -- a request. Evidence shows that the request was never honored. Indeed, the worthless stocks remain in the "estate" of World Life to this day. The facts simply do not support an argument that there was a rejection per se. Therefore, defendants are wrong to argue that the defendants never made any material misrepresentations or omissions.

The Supreme Court articulated its test in Basic, Inc. v. Levinson, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1987) that a material fact is one which would significantly alter the total mix of information available to a prospective purchaser or investor. After reviewing the record, the Court finds that there is no evidence in the record of this case which would support an argument that there was information provided by sources other than the defendants themselves which significantly altered the total mix available, such that this other information turned the defendants' material misrepresentations and omissions into non-material information to justify an acquittal.

Finally, there is no requirement that the misrepresentations actually succeed in defrauding actual purchasers in order to establish securities fraud and conspiracy to commit securities fraud. Statements may constitute material misrepresentations even though a person obtains other information from other wholly independent sources as a basis for rejecting the offered stock. Moreover, there is no requirement under the federal

securities laws to show any reliance by victims. SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 (9th Cir.1992).

4. Sufficiency of Evidence as to Jensen[11]

Defendant Jensen argues that if the Court dismisses the conspiracy count on the basis of insufficiency of the evidence, all the substantive securities counts must also be dismissed because the jury could have overreached. This argument must be rejected though because there simply is no legal precedent that would support this argument under the facts of this case. Jensen also claims that the government's evidence failed to establish a specific intent to defraud the named victims in the indictment. For the reasons listed above in the conspiracy section, the Court rejects this argument.

***16** Jensen, joined by Yeaman, further contends that the evidence fails to support his conviction because he never dealt directly with the victims as "purchasers," only with Forum. As explained above, in a prosecution for securities fraud, there is simply no requirement that there actually be a "purchaser" for a conviction to be sustained. Naftalin, 441 U.S. at 773. It logically follows that the government would have no burden to establish that the defendants dealt directly with the "purchaser."

As with his co-defendants, the evidence against Jensen sufficiently supports his conviction as to Count Eleven. The evidence supported his conviction of securities fraud under each of the subdivisions of Section 17(a). The evidence supports a finding that Jensen participated with co-conspirators Rennert, Miller and Mendenhall to artificially reduce the percentage of his Ecotech share-

[11] This section addresses Count Eleven, dealing with the substantive securities fraud charge.

holdings so he could manipulate the secondary market under the guise of being an interested investor when, in fact, he was a control person and the purpose was to support the artificial bid price used to lease the stock to the Teale Network. (See Govt's Br. at 54-57; citing evidence of record). In sum, the evidence at trial is sufficient to support the verdict that Jensen engaged in acts, practices and courses of business, schemes and artifices to defraud by releasing unregistered securities into the marketplace, artificially maintaining the price of Ecotech stock, and by profiting financially from the Ecotech stock that was pledged to an escrow account at Corestates under a surplus contribution agreement.

5. Sufficiency of Evidence of Securities Fraud as to Mendenhall

Defendant Mendenhall contends that if the jury hung on wire fraud and conspiracy counts and convicted him on the securities fraud counts which, he alleges, are supported on identical facts and theories, the verdict as to the counts cannot stand. This position is without merit.

The Supreme Court has held that there is no reason to vacate a conviction merely because the verdicts of acquittal on predicate charges cannot be rationally reconciled. The Supreme Court has noted that a jury may acquit on certain charges out of lenity or some other improper motivation. The defendant is protected against jury irrationality or error by the independent review of the sufficiency of the evidence on the convicted charges. United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984); United States v. Vastola, 989 F.2d 1318 (1993).

Moreover, the evidence against Mendenhall is more than sufficient to support the verdict as to the substantive securities counts. Mendenhall was the person who ran the operations of Forum. He, perhaps better than any other defendant, with the exception of Rennert, knew the precise details of the scheme and the identity of the victims, including World Life, and the purpose of the pledge of stock in the Corestates escrow account. Indeed, the government describes in detail a vast amount of evidence that supports Mendenhall's substantive securities law convictions. (Govt's Br. at 59-62).

*17 In sum, the Court finds that the convictions obtained by the government were all supported by sufficient evidence at trial. Thus, the Court will deny the defendants' Rule 29 motions for judgment of acquittal.

III. Rule 33 Motions for a New Trial

A. Legal Standards under Rule 33

A district court may grant a defense motion for a new trial, "if required in the interests of justice." Fed.R.CrimP. 33. The decision whether or not to grant a motion for a new trial is within the sound discretion of the trial court. United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir.1985).

"'A motion for a new trial is addressed to the trial judge's discretion ....'" United States v. Console, 13 F.3d 641, 665 (3d Cir.1993) (quoting Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir.1985)). "A motion for a new trial is not favored and is viewed with great caution." United States v. Miller, 987 F.2d 1462, 1466 (10th Cir.1993). This power should only be exercised sparingly. United States v. Bertoli, 854 F.Supp. 975 (D.N.J.1994).

A new trial should be granted only where there is a reasonable probability that the trial error could have had a substantial impact on the jury's decision. Government of Virgin Islands v. Bedford, 671 F.2d 758, 762 (3d Cir.1982). "The court has discretion in passing on the motion, but it should hold in mind the harmless error provisions of Rule 52, and refuse to grant a new trial if the substantial rights of the defendant were not affected." Wright, Federal Practice and Procedure: Criminal 2d, § 551 (1982 & Supp.1995).

Unlike motions for acquittal, in a motion for new trial the court need not view the evidence in the light most favorable to the government. Instead, the court must weigh evidence and consider the credibility of witnesses. See Martinez, 763 F.2d at 1312. The Eighth Circuit has explained that when considering a motion for a new trial:

> [t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir.1980). In making its Rule 33 inquiry, courts should always assess the weight of the evidence consistent with human experience.

B. Weight of the Evidence

In this case, all of the defendants make a general argument that the verdict was against the weight of the

evidence. In addition to this argument, Yeaman contends that any misstatements or omissions were not reasonably calculated to deceive persons of ordinary prudence and comprehension, citing United States v. Brown, 79 F.3d 1550, 1157 (11th Cir.1996). For the following reasons, these arguments necessarily fail.

***18** After reviewing the evidence at trial and assessing the credibility of the witnesses, the Court concludes that there was ample evidence to support the jury's verdict, much of which has already been described in the preceding sections. Although this case involved a complex scheme and conspiracy to defraud, the testimony and documentary evidence corroborated each other, demonstrating similar patterns of fraudulent activity among a common set of participants, in furtherance of a common goal. In light of these observations, the Court simply cannot find that the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred. Thus, the Court rejects the defendants' general argument that the verdict was against the weight of the evidence.

The Court also rejects Yeaman's argument. First, the Court gave a "Brown" charge in its wire fraud instructions to the jury. Second, the circumstances which propelled the objective standard in Brown do not exist in this case. In Brown, the Eleventh Circuit found that snowbelt buyers of Florida homes could easily confirm the (defendant) seller's representations about the resale or rental value of the Florida homes "from readily available external sources." Id. at 1559. By contrast here, the stock market was the only readily external source to which the purchasers of the Forum stocks could turn and that source was controlled by the defendants' own

actions. Thus, in this case, the reason for a Brown charge does not exist.

In addition, the language of "ordinary prudence and comprehension" of the victim must also be reconciled with the concept that the mail and wire fraud statutes were intended to protect the gullible as well as the skeptical. United States v. Coffman, 94 F.3d 330, 334 (7th Cir.1996). Courts of Appeals, including this Circuit, have said that the "reasonably calculated to deceive persons of ordinary prudence" phraseology should focus on the defendant and "provides the fact-finder with a standard for determining from the accused's actions whether the accused possessed the requisite mens rea for his actions." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir.1995).

In this case, the evidence as to the sophistication with which this scheme was conducted, the multiple levels of fraudulent activity among the conspirators, and the cover of a contrived bid price in the secondary market at the core of the scheme would certainly sustain the finding by the jury that the misrepresentations and omissions in this type adequately showed defendants' intent to commit wire fraud and securities fraud, neither of which could not have been detected by persons of ordinary prudence and comprehension.

C. Challenges to the Jury Instructions

As a general principle, it is important to note the following admonition at the outset of this discussion regarding jury instructions:

> The trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented.... Equally important, the propriety of a given instruction, or the failure to give a particular instruction, is not received

in the abstract; rather, the adequacy of the entire charge is taken in the context of the whole trial is [the] proper scope of inquiry.

*19 United States v. Dozier, 672 F.2d 531, 541 (5th Cir. 1982).

The defendants complain that various parts of the Court's charge were erroneous as a matter of law and entitle them to a new trial. The Court will address these arguments seriatim.

1. Intent

Defendant Mendenhall argues that "numerous jury instructions" (without identifying which instructions) somehow "negated the court's limited instruction on the intent required to convict" under criminal law mens rea standards applicable to securities fraud. This argument fails.

The intent standard for a violation of Section 17(a) of the Securities Act was set forth in an instruction captioned "FRAUD IN THE OFFER OR SALE OF SECURITIES -- 15 U.S.C. § 77Q; SECOND ELEMENT -- WILLFULLY DEFINED." The Court finds that this instruction is fully consistent with the required mens rea showing under Section 24 of the Securities Act of 1934, the section of the Securities Act which makes willful violations of the Act criminal offenses.

The "willful" standard under Section 24 has been defined to mean "to act intentionally or with a bad purpose and to do something that the law forbids." United States v. Gentile, 530 F.2d 461, 469 (2d Cir.1976). The charge in this case was consistent with that definition, because it instructed the jury that "an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law requires

to be done; that is, to act or participate with bad purpose, to either disobey or disregard the law." (Jury Instructions at 31). The Court thus rejects defendants' argument.

2. "Underwriter" Instruction

Defendant Rennert argues that the instruction concerning Forum as an "underwriter," if the jury should so find, was new and effected a prejudicial variance. This argument must also fail.

To begin, the indictment charges that defendants "caused the creation of, offered, and caused the delivery of" shares of the stocks. This language encompasses the activities of an underwriter, even though that specific term was not used in the indictment. The theory expressed by this jury instruction was not to suggest an independent, separate, substantive charge, but rather just to describe for the jury one of the several acts, practices and courses of business in which the jury could find that the defendants engaged in to effect their fraud by circumventing the federal securities laws.

The Court also finds that this instruction was proper as a matter of law. Securities must be registered for distribution unless an exemption is available. 15 U.S.C. § 77e. Section 4(1) of the Securities Act--one of the exemptions raised by defense counsel at trial and now here--exempts from the registration requirements transactions by persons other than an issuer, underwriter or dealer. 15 U.S.C. § 77d(1). An "underwriter" is defined in Section 2(11) of the Securities Act of 1933 as any person who "offers or sells for an issuer in connection with the distribution of any security or participates or has direct or indirect participation in any such undertaking ...." For purposes of Section 2(11), the term "issuer" includes any person directly or indirectly controlling the issuer. If a

person or entity is determined to be an underwriter, the exemption under 4(1) is not applicable and the person or entity will be deemed to have acted as an underwriter in an unregistered distribution of securities.

***20** The correct inquiry under the instructions is whether or not the defendants engaged in an unlawful distribution of securities, and if they did, whether that unlawful distribution was one of many acts, practices, and courses of business used to effect the charged fraud. Thus, the question to be addressed is whether there was a conspiracy to violate the anti-fraud provisions that were alleged in the indictment and at issue in this case. This is not a case of whether the defendants engaged in an unregistered distribution under Sections 4(1) and 5 of the Securities Act of 1933. Thus, the defendants' arguments about the availability of these other exemptions is irrelevant to the issues before this Court. The violations at issue in this case involve fraud, and not whether defendants engaged in unregistered distributions per se under Sections 4(1) and 5 of the Securities Act.

Finally, defendants' argument that they were "surprised" by this potential legal theory at the end of the proceedings is unfounded. The government served proposed jury instructions on defendants prior to the commencement of trial, which included this instruction. Thus, unless defendants' counsel did not review the proposed charge of the government, there could not have been any surprise at the end of the trial.

3. Rule 144 and Regulation S

Yeaman contends that, based on the Court's instructions, the jury could convict if it found that defendants failed to satisfy either Rule 144 or Regulations S. This argument is simply incorrect.

Throughout the course of the trial, the defendants argued that they were in complete compliance with the securities laws. As such, the jury required an instruction on whether the defendants' conduct satisfied, or failed to satisfy, the technical requirements of the law. If the jury found that they did not, the failure to comply with Rule 144 and Regulation S could be considered as additional practices offered as proof that defendants' scheme was intended to violate the anti-fraud provisions of the federal securities laws.

These instructions neither amended the indictment nor authorized or established an independent, substantive violation. The fact that the securities may not be restricted under some other provision of the federal securities laws is irrelevant to this case because it was in reliance on Rule 144 and Regulation S that the defendants in this case sought to avoid registration. The records in this case of each transfer expressly made reference either to Rule 144 and/or Regulation S. Thus, it was not erroneous for the jury to be instructed exclusively on these two regulations.

Moreover, Yeaman and the government at trial stipulated that the shareholder's list, created by Yeaman's own company, NST, showed that the escrow stocks (in the name of the Pennsylvania Statutory Liquidator) were restricted. Thus, defendant cannot now be heard to argue that some other provision of the federal securities laws may arguably support on argument that the stocks were not restricted because the evidence shows that they were restricted.

***21** Additionally, intent to circumvent the law deprives defendants on their reliance on the safe harbor provisions for purposes of avoiding registration under the

Securities Act of 1933. Thus, even if the defendants had been in technical compliance of the law, where their intent was to circumvent it, they may not claim its protection. See SEC Release 33-5223, at 10 (Jan. 11, 1972); Preliminary Notes to Rule 144.

Finally, even if the defendants had complied with the safe harbors or could claim another exemption, they would not be exempt from the anti-fraud provisions of the federal securities laws. See, e.g., Regulation S, 17 C.F.R. § 230.901-904. When fraud has been committed, neither an exemption from registration nor the filing of a registration statement will prevent liability.

Thus, there is no merit to defendants' contentions about the possible availability of another exemption. It would not save them from a conviction under the anti-fraud provisions.

3. Materiality

Defendant Yeaman contends that the Court erred in its instruction as to "FAILURE TO DISCLOSE -- ADDITIONAL MATERIAL INFORMATION -- HALF TRUTHS -- PRIOR SECURITIES LAW VIOLATIONS" because the Court did not restate its previous instructions that omissions as to prior violations must be found to be "material." Yeaman repeats this complaint as to the "short instruction on page 45 entitled 'Fraud & Deceit -- Financial Statements not in Accord with GAPP.'" Viewing the charge as a whole, the Court finds that Yeaman's argument is without merit.

In the charge on the elements of securities fraud, the Court articulated the test the jury must apply in determining whether "facts stated or omitted were 'material'" and the government must prove that the

defendant had a duty to disclose a material fact.[12] (Jury Instructions at 39). Yeaman does not claim that this instruction was erroneous, rather he seems to argue that the Court should have repeated the definition of "materiality" each time the Court used the words "materiality" or "material" in its charge. This contention is simply without merit. As stated above, the jury charge should be read as a whole, not as separate and distinct parts. Reading the charge as a whole, it is clear that the jury was equipped with the definition of "materiality" and that the jury could not have failed to appreciate that any finding of material misstatement necessary to convict any defendant of securities fraud required a finding of "materiality" as the term was defined.

5. Market Manipulation

Defendant Yeaman complains that the Court's instructions as to manipulation were "unnecessary and confusing," as well as "erroneous." The Court simply disagrees.

First, contrary to the defendant's suggestion, the government did not charge the wrong statutory scheme for market manipulation of the over-the-counter stocks. Every Court and commission, when faced with this issue, have squarely held that market manipulation of the over-the-counter marketplace is analyzed under and

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[12] The jury instruction, in part, read as follows:

> A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available to him or her in order for them to use in their investment decision-making process.

(Jury Instructions at 39).

violative of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Exchange Act of 1934. See, e.g., SEC v. Lorin, 877 F.Supp. 192, 196 (S.D.N.Y.1995), modified, 76 F.3d 458 (2d Cir.1996). This includes criminal cases. See, e.g., United States v. Charnay, 537 F.2d 341 (9th Cir.1976); United States v. Russo, 74 F.3d 1383, 1390 (2d Cir.1996). Thus, there is no basis for defendants' criticism of this instruction.

***22** Moreover, the Court's instruction, that a showing of manipulative purpose is not required, was accurate. Charnay, supra; Lorin, supra. Thus, Yeaman's contentions as to these jury instructions do not entitle him to relief.

6. Industry Terms

Defendants' objections to this Court's instruction which defined industry terms are wholly without merit. They were terms used at trial and terms whose definitions would be unfamiliar to any layperson. Instructions as to these terms simply could not prejudice nor benefit one particular party over another. Instead, these instructions provide the jury with needed insight into the securities industry in order to better fulfill their obligations as jurors. Finally, the Court notes that the definitions supplied came directly from the Exchange Act of 1934.

7. Market Manipulation Terms/Practices

The Court finds that any objections with respect to the instructions which dealt with market manipulation terms and practices are wholly without merit. The Court, in these instructions, merely described certain market practices which have been found to be manipulative. These definitions were necessary because the terms and practices are "terms of art" or only readily understandable if you are actually involved in the securities industry. Thus,

the Court instructed the jurors as to these terms so that they could more properly and fairly consider the case.

In addition, these instructions were presented in a neutral manner. The jury instructions simply stated that if these practices were present, then the jury could draw the inference, if it chose, that the practice was done to create a false appearance of activity to support the stock's price. This is an accurate statement of the law.

With respect to the "box jobs" charge, the Court finds that this charge was not erroneous. Once again, the Court merely described to the jury exactly what a "box job" is considered in the securities industry. In addition, the Court instructed that if the jury found that a box job had occurred, then the jury could consider this evidence in determining whether a "scheme, material misrepresentation, practice, or course of business that operated as a fraud" was present. Nowhere in this specific charge did the Court instruct the jury that they should convict the defendants if they found that a box job occurred. Indeed, the Court merely stated that the jury should consider this evidence like any other evidence admitted at trial.

8. Special Unanimity Charge -- 15 U.S.C. § 77q(a)

Defendant Jensen now complains that the Court was obliged to instruct the jury that it must be unanimous on which of the three "routes" Jensen was found guilty of violating in Count Eleven, charging securities fraud in the offer and sale of Ecotech stock, under Section 17 of the Securities Act of 1933. 15 U.S.C § 77q(a). Because none of the defendants raised this objection at any time prior to, during or before the jury retired for its verdict, the issue is waived. Fed.R.Crim.P. 30.

9. Court's License to Instruct the Jury

***23** Defendant Yeaman complains that the Court exceeded its license to instruct on such "impermissible topics as legislative history, disputed facts and the government's theories of prosecution." These contentions are without merit.

In a securities fraud case, an instruction to the jury explaining the general purpose of the statutes is not improper. Such an instruction is not prejudicial to the defendant and may be helpful to the jury. United States v. Rachal, 473 F.2d 1338 (5th Cir.1973).

The Court also finds that instructions that contained the government's contentions were proper. This Court never expressed its personal views about the government's contentions. In addition, the Court always prefaced the government's contentions with the language, "the government contends...." Moreover, the Court specifically instructed the jury that they should assess the weight of evidence underlying such contentions and that it was the jury's independent deliberations which would determine whether the evidence supported such contentions. See Seidman v. Fishburne-Hudgins Educ. Found., 724 F.2d 413 (4th Cir.1984). The Court also notes that it requested from the defendants and instructed the jury in full as to what the defendants provided as their theories of defense.

In sum, the Court finds that the charge was fair and accurate in the context of the entire trial and the jury instructions as a whole.

D. Court's Ruling that Findings of Fact of Pennsylvania Insurance Commissioner was Irrelevant and Prejudicial

Before trial, defendants moved to admit the entire Findings of Fact of the Pennsylvania Insurance Commis-

sioner resulting from the liquidation proceedings against World Life, under Fed.R.Evid. 803(8)(C). The defendants renewed their motion at trial. The Court ruled that the evidence proffered was inadmissible under Fed.R.Evid. 402 because it was not relevant to the criminal proceedings under Fed.R.Evid. 401. The Court also excluded the evidence proffered under Fed.R.Evid. 403 because the admission of the Findings of Fact would improperly confuse the issues and mislead the jury from the issue in this case, the defendants' intent to defraud.

Defendants Yeaman and Rennert, joined by others, contend that this ruling was erroneous. Notwithstanding defendants' arguments to the contrary, the Court reaffirms its previous ruling, finding that the Findings of Fact were properly excluded from trial as irrelevant and prejudicial. Thus, the Court rejects defendants' argument that it committed trial error by excluding the Findings of Fact from evidence.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will deny defendants' motions for judgment of acquittal and for a new trial.

An appropriate Order follows.

ORDER

AND NOW, this 17th day of September, 1997, upon consideration of Philip Rennert's Motion for a Judgment of Acquittal and/or New Trial; David Yeaman's Motion for Judgment of Acquittal and for a New Trial; Michael Miller's Motion for a Judgment of Acquittal and for a New Trial; George Jensen's Motion for Judgment of Acquittal and for a New Trial; and Nolen Mendenhall's Motion for Judgment of Acquittal and a New Trial, and

the government's joint response thereto, it is hereby ORDERED that said Motions are DENIED.

*24 AND IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1101 & 98-1145

UNITED STATES OF AMERICA

v.

PHILIP ANDRE RENNERT

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, RENDELL AND STAPLETON,* Circuit Judges

The petition for rehearing filed by Appellant Philip Andre Rennert in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having [*2]voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Becker would grant rehearing *en banc,* believing that the panel's opinion is in conflict with the considered dicta in

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* Hon. Walter K. Stapleton, Senior Circuit Judge, as to panel reahearing [sic] only.

United States v. Naftalin, 99 S.Ct. 2077 (1979), where the Court, referencing the statute in question stated: ["]Each succeeding prohibition is meant to cover additional kinds of illegalities -- not to narrow the reach of the prior sections.["]

By the Court,

__/s/Delores K. Sloviter__
Circuit Judge

Dated: 17 NOV 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1103 & 98-1147

UNITED STATES OF AMERICA

v.

MICHAEL LEWIS MILLER

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, RENDELL AND STAPLETON,* Circuit Judges

The petition for rehearing filed by Appellant Michael Lewis Miller in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having [*2]voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Becker would grant rehearing *en banc,* believing that the panel's opinion is in conflict with the considered dicta in United States v. Naftalin, 99 S.Ct. 2077 (1979), where the Court, referencing the statute in question stated: ["]Each succeeding prohibition is meant

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* Hon. Walter K. Stapleton, Senior Circuit Judge, as to panel rehearing only.

to cover additional kinds of illegalities -- not to narrow the reach of the prior of the prior sections.["]

By the Court,

__/s/Delores K. Sloviter__
Circuit Judge

Dated: 17 NOV 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 98-1104 & 98-1148

UNITED STATES OF AMERICA

v.

GEORGE RAYMOND JENSEN

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, RENDELL AND STAPLETON,* Circuit Judges

The petition for rehearing filed by Appellant George Raymond Jensen in the above-entitled cases having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, [*2]and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Becker would grant rehearing *en banc,* believing that the panel's opinion is in conflict with the considered dicta in United States v. Naftalin, 99 S.Ct. 2077 (1979), where the Court, referencing the statute in

* Hon. Walter K. Stapleton, Senior Circuit Judge, as to panel rehearing only.

question stated: ["]Each succeeding prohibition is meant to cover additional kinds of illegalities -- not to narrow the reach of the prior of the prior sections.["]

By the Court,

__/s/Delores K. Sloviter__
Circuit Judge

Dated: 17 NOV 1999